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1 (Caption omitted)

2 In the United States District Court, Eastern District of Texas, Texarkana Division

No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. McDONALD, WARDEN, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Randolph Bryant, Judge of Said Court:

Your petitioner, Marton L. Whelchel, respectfully represents:

1. That he is (and was during all of the time herein mentioned) a citizen of the United States of America and a citizen of the State of Texas.

2. That A. McDonald is the duly appointed and acting warden of the Federal Correctional Institute at Texarkana, Texas.

3. Petitioner states that he is 25 years of age, unmarried, and with a widowed mother, Mrs. Ebby Whelchel, whose address is Queen City, Texas; that he was born in East Texas in Cass County, Texas, and lived there until he was inducted into the army at Texarkana, Texas, on the 15th day of January, 1941; that he was assigned to various units and on the 12th day of April, 1945, he was a Private in Company C, 602nd Tank Destroyer Battalion; that as a soldier and member of the 602nd Tank Destroyer Battalion he participated in the Normandy Invasion and drive through Northern France and numerous battles in Northern France and Germany; that he was engaged in combat continuously from August, 1944, until March, 1945, at which time he was accused of rape and arrested and tried before Court-Martial on April 10, 1945; that on April 10, 1945, he was arraigned and tried before said Court-Martial;
3 that he was found guilty and sentenced to death; that afterwards, the death sentence was reduced to life imprisonment and afterwards, in 1947, the sentence was reduced to twenty-one years; that under said sentence he is now being held in the United States Correctional Institute at Texarkana, Texas.

4. Petitioner says that he is not guilty of the charges against him and has at all times maintained his innocence; that petitioner verily believes that at the time of the alleged occurrence, he was totally incapacitated mentally. Petitioner further says that by reason

of his service he is informed and verily believes that he had "cracked up" shortly before the alleged occurrence in which he was charged with rape; that he is further informed and verily believes that, if, in fact, the act of rape occurred, he was suffering from total amnesia and knew nothing of the happenings and knows nothing now of the same, if, in fact the said happenings did occur as charged against him; that petitioner is informed and verily believes that the state of his mind was such at the time the charges were brought against him that he could not fully appreciate the gravity of the situation and refused to cooperate with counsel appointed to defend him, believing in his own mind that the offense had not occurred so far as he was concerned and refusing to be alarmed at the charges.

5. Petitioner alleges that the Court-Martial that tried him was without authority in law in that the act of Congress providing for Courts-Martial and the Manual for Courts-Martial were void and of no effect because of no provision therein for a trial of a private soldier before a court composed of at least some members of his own class; but, on the contrary, the court was composed, and the law provided for the court to be composed of, superiors of petitioner, only; that is, commissioned officers; that the said provisions of the law establishing Courts-Martial and the provisions of the Manual for Courts-Martial providing for officers only to compose the
4 said court is unconstitutional and void under the 5th and 9th Amendments of the Constitution of the United States; in that the petitioner was denied the right of trial before his peers, the fundamental right of all English speaking peoples since Magna Carta, and firmly established in American jurisprudence at the time of the adoption of the said 9th Amendment.

5a. Petitioner further alleges that the proceedings before the Court-Martial were void and of no effect because the set-up under the Code and set forth in the Manual for Court-Martial is unconstitutional, in that the procedure set forth does not allow an accused before said court representation upon said court from his class; further, that procedure provides that the accused shall have no voice in the selection of the membership of the said court, but the same is placed in the hands of the General in command who appoints the court from officers under him, appoints counsel for the prosecution and appoints counsel for the defense without giving the accused any voice therein, whatsoever; that by reason of the said procedure, courts-martial have become, and were at the time petitioner was tried, a mere formality whereby the commanding general was empowered to visit summary punishment upon the accused. The entire membership of the court and the officers appointed, by reason of fear of displeasure of their commander being under coercion and restraint to such extent that they could not render a fair and im-

partial trial to the accused; that the said prosecution violates the Fifth Amendment to the Constitution of the United States in that a trial by court-martial such as petitioner had in this case deprives petitioner of his rights under said Fifth Amendment and deprives him of his liberty without due process of law; that the said prosecution is so unfair and unjust as to violate the fundamental concepts of a fair and impartial trial guaranteed by the Fifth Amendment to all persons being tried in courts of the United States.

5 6. Petitioner further alleges that after the trial and he was found guilty, it came to the attention of his counsel that there was a question of whether or not at the time of the alleged commission of the offense, the petitioner was in such state of mind as to know the nature and consequence of the acts, whereupon, counsel for the petitioner made application for neuropsychiatric examination of petitioner and his request was concurred in by five members of the Court-Martial; that the said examination was granted and Captain Nino M. Pellettieri, Surgeon, 602nd Tank Destroyer Battalion, made a neuropsychiatric examination of the petitioner and reported his findings on April 23, 1945, that petitioner was suffering from total amnesia and knew nothing of the whole incident; that there was no provision of the law whereby the Court-Martial that tried petitioner could grant a new trial and reconsider the newly discovered evidence as shown in the report of Captain Pellettieri, together with statements from First Lieutenant Robert E. Graham and Sergeant Harry P. Goolsby, dated April 24, 1945, wherein Lieutenant Graham stated that in his opinion Private Whelchel was mentally unstable, and also a statement of Sergeant Goolsby to the effect that Private Whelchel had theretofore "cracked up" mentally; that the failure of the law to provide for a new trial by the Court-Martial deprived the petitioner of his rights under the due process clause of the Constitution of the United States; that, thereby, the said judgment and conviction of petitioner was wholly void and of no effect.

7. Petitioner further alleges that upon his information and belief that there was no thorough and impartial investigation of the charges before his case was referred to the General Court-Martial as provided by law and by the Manual for Courts-Martial, Section 35, in that there was no thorough and impartial investigation made of the mental condition of petitioner before the said charges were made; that had there been a thorough and impartial investigation

6 it would have resulted in a finding that petitioner, at the time of the acts complained of, was suffering from total amnesia, having previously had a "crack up" by reason of the severe strain from Normandy through France and Germany; that the failure to have the said thorough and impartial investigation

was a denial of the rights to petitioner under the due process clause of the Constitution of the United States.

8. Petitioner further alleges that the reviewing authority abused its discretion in its failure to order a new trial for petitioner on the ground that petitioner's mental condition was not such as to be sufficient to charge him with responsibility for his acts; that the reviewing authority had before it the report of Captain Pellettieri and the statements of Lieutenant Robert H. Graham and Sergeant Harry P. Goolsby, but arbitrarily and intentionally disregarded same; and which said arbitrary and intentional acts deprived petitioner of his rights under the due process provision of the Constitution of the United States.

9. Petitioner further alleges that he should not have been tried by the said Court-Martial at the time he was tried because the Court-Martial had information upon which said court should have suspected insanity of petitioner, both at the time of the alleged occurrence of the acts charged as constituting the offense, and at the time of trial, and should have proceeded under Paragraph C of Article 35 of the Manual for Courts-Martial, United States Army, page 26; that a thorough investigation would have disclosed the facts as set forth in the report of Captain Pellettieri and the statements of Lieutenant Graham and Sergeant Goolsby, as aforesaid; that after the trial and before the review by the Judge Advocate General's Department, affidavits were submitted and a report of a psychiatrist, all showing the bad mental condition of petitioner and giving notice sufficient under Paragraph C, Article 35, of the Manual for Courts-Martial, U. S. A., to have put the reviewing authorities upon notice of the condition of the petitioner, whereby it became the duty of the Judge Advocate's Department to order a thorough investigation and have a thorough neuropsychiatric examination of the petitioner before affirming the case; further the said reviewing authorities had before them a recommendation by five members of the Court-Martial which tried petitioner concurring in a request by petitioner's counsel that the case be re-opened and the petitioner be admitted to a hospital for a thorough neuropsychiatric examination, but said reviewing authorities arbitrarily and intentionally ignored the same and approved the death penalty for petitioner; that, therefore, the petitioner was deprived of his rights under the due process clause of the Constitution of the United States, in that the Court-Martial and the reviewing authority failed and refused to follow the provisions of the law as aforesaid.

10. Petitioner further alleges that the Adjutant General and the Judge Advocate General of the United States are in possession of

all the records, data, material, documents and correspondence pertaining to the trial of the petitioner and which said information is sorely needed by petitioner in order to present his case to this court.

11. Petitioner further alleges that the procedure in his trial amounts to a denial of due process of law provided for by the Fifth Amendment of the Constitution of the United States; that in the entire proceedings there was total failure to observe that fundamental fairness essental to the very concept of justice; that the acts both of the trial Court-Martial and of the reviewing authorities were arbitrary and unfair to such an extent that the whole trial was infected and prevented a fair trial.

12. Premises considered, petitioner alleges that the acts and conduct of the Court-Martial before which he was tried were null and void; that respondent is illegally holding petitioner in custody and depriving him of his liberty, contrary to the Constitution and laws of the United States.

8 Wherefore, petitioner prays this honorable court to issue Writ of Habeas Corpus directing respondent to produce petitioner before this court for a hearing and determination of the issues made as hereinbefore set forth; that an immediate hearing of this petition be had; for an order subpoena duces tecum to the Adjutant General and Judge Advocate General of the War Department of the United States at Washington to produce before this court all records, documents and information of every kind in the files of the said department pertaining to this cause; that on final hearing, the court enter judgment and decree vacating and setting aside petitioner's conviction and sentence and ordering petitioner discharged from further imprisonment.

(S.) MARTON L. WHELCHEL,
Petitioner.

HUGH CARNEY,
Atlanta, Texas.

Duly sworn to by Marton L. Whelcher. Jurat omitted in printing.

9 In the District Court of the United States

[Title omitted]

ORDER TO SHOW CAUSE—Filed January 13, 1949

The above entitled matter having this day been presented to me, it is

ORDERED that the Respondent show cause, if any, at Texarkana, Texas, at 2 P.M. upon Monday, January 17, 1949, why the writ of habeas corpus should not be granted.

Thus done and ordered at Sherman, Texas, this 13th day of January, 1949.

(S.) RANDOLPH BRYANT,
United States District Judge.

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10 In the District Court of the United States

[Title omitted]

ANSWER OF RESPONDENT—Filed February 18, 1949

Comes A. McDonald, Warden of the Federal Correctional Institution, Texarkana, Texas, and makes answer to the order to show cause why a writ of habeas corpus should not issue, and for return and answer says:

He holds said Marton L. Whelchel in custody in the Federal Correctional Institution at Texarkana, Texas, by virtue and under the authority of General Court Martial Order No. 388, Headquarters United States Forces European Theatre, dated September 6, 1945, copy of which is hereto annexed as Exhibit "A" and made a part hereof, as modified by succeeding orders and designations of places of confinement, all as evidenced by a record of court commitment, copy of which is hereto annexed as Exhibit "B" and made a part hereof.

Upon information and belief Respondent says that Petitioner was tried before a General Court Martial appointed by Commanding General 89th Infantry Division on charges of rape, in violation of the 92nd Article of War, and assault with intent to commit rape, in violation of the 93rd Article of War. Said Petitioner was found guilty as charged and was sentenced to be hung by the neck until dead. The above sentence was approved by the reviewing authority and was confirmed by the confirming authority, but was commuted to "dishonorable discharge from the service, forfeit of all pay and allowance due or to become due, and confined at hard labor for the

term of his natural life". Said term of confinement on July 16, 1947, by direction of the President was reduced to 21 years.

Petitioner is presently engaged in serving said sentence
11 of confinement in custody of Respondent.

In answer to the several allegations of Petitioner, Respondent admits, denies and explains as follows:

1

Respondent admits allegations of paragraph No. 1.

2

Respondent admits allegations of paragraph No. 2.

3

Respondent admits so much of the allegations of paragraph No. 3, as allege that Petitioner was tried before a Court Martial on April 10, 1945, and was found guilty and sentenced to death, that said sentence was subsequently commuted to life imprisonment, and later reduced to confinement for 21 years, and that Petitioner is now being held by Respondent under said *said* sentence.

Respondent neither admits nor denies the other allegations of Paragraph No. 3, having no knowledge thereof.

4

Respondent denies the allegations of paragraph No. 4.

5

Respondent denies the allegations of paragraph No. 5.

5a

Respondent denies the allegations of paragraph No. 5a.

6

Respondent denies the allegations of paragraph No. 6.

7

Respondent denies the allegations of paragraph No. 7.

8

Respondent denies the allegations of paragraph No. 8.

9

Respondent denies the allegations of paragraph No. 9.

10

Respondent has available for the use of Petitioner and the Court authenticated copies of the proceedings of the Court
12 -Martial.

11

Respondent denies the allegations of paragraph No. 11.

12

Respondent denies the allegations of paragraph No. 12.

Further answering, upon information and belief Respondent says that all proceedings prior to, during and subsequent to the trial of Petitioner by General Court Martial were legal, lawful and proper in all respects, and at all stages petitioner was afforded every right and privilege to which he was entitled.

Further answering, Respondent says that the Petitioner has filed to exhaust the remedies provided by statute before recourse to this Court in habeas corpus, in that he has not petitioned the Judge Advocate General for a new trial under the provisions of Article of War 53 (Sec. 230, Title 11, Public Law 759, 80th Congress; Act of June 24, 1948, 62 Stat. 627) and the procedure established by the President in Chapter XXII of the Manual for Courts-Martial, U. S. Army, 1949 (page 7550, Federal Register, Vol. 13, No. 238, December 8, 1948; page 119, Federal Register, Vol. 14, No. 7, January 11, 1949).

(S.) A. McDONALD,
Warden, Federal Correctional Institution, Texarkana, Texas.

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13 EXHIBIT "A" TO ANSWER

RESTRICTED

HEADQUARTERS
U. S. FORCES, EUROPEAN THEATER

General Court-Martial
Orders No. 388

6 Sep. 1945.

Before a general court-martial which convened at Immerath, Germany, on 10 April 1945, pursuant to paragraph 1, Special Orders

No. 32, Headquarters 89th Infantry Division, 26 March 1945, was arraigned and tried:

Private *Marton L. Whelchel*, 18038433, Company C, 602d Tank Destroyer Battalion.

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, and Tec 5 Elmer L. Spohn, Company C, 602nd Tank Destroyer Battalion, acting jointly and in pursuance of a common intent, did, at Immerath, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, did, at Immerath, Germany, on or about 14 March 1945, with intent to commit a felony, viz. rape, commit an assault upon , by willfully and feloniously removing her step-ins from and throwing the said on a bed.

PLEAS

To all the Specifications and Charges: NOT GUILTY.

FINDINGS

Of all the Specifications and Charges: GUILTY.

SENTENCE

To be hanged by the neck until dead. (No previous convictions considered.)

The sentence was adjudged on 10 April 1945.

The action of the convening authority is:

"HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Division Commander
APO 89, U. S. Army

19 April 1945

In the foregoing case of Private Marton L. Whelchel, 18038433, Company "C", 602d Tank Destroyer Battalion, the sentence is approved and the record of trial forwarded for action under Article of War 48.

14-17

(S.) THOMAS D. FINLEY,
(T.) THOMAS D. FINLEY,
Major General, U. S. Army,
Commanding."

The action of the confirming authority is:

"HEADQUARTERS
EUROPEAN THEATER OF OPERATIONS
UNITED STATES ARMY

In the foregoing case of:

Private Marton L. Whelchel, 18038433,
Company C, 602d Tank Destroyer Battalion,

the sentence is confirmed, but, owing to special circumstances in this case, is commuted to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The U. S. Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.

(S.) DWIGHT D. EISENHOWER,
(T.) DWIGHT D. EISENHOWER,
General of the Army, U.S.A.,
Commanding.

7 June 1945."

The sentence, having been approved by the convening authority, confirmed and commuted by the Commanding General, European Theater of Operations, and Article of War 50½ having been complied with, as so commuted, will be duly executed. (CM FTO 12873)

BY COMMAND OF GENERAL EISENHOWER:

W. B. SMITH,
[SEAL.] *Lieutenant General, USA, Chief of Staff.*

R. B. LOVETT,
Brigadier General, USA, Adjutant General.

DISTRIBUTION: M.

18-19 In the District Court of the United States, for the Eastern District of Texas, Texarkana Division

Civil Action No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. MCDONALD, WARDEN, RESPONDENT

Reporter's Transcript of Hearing

APPEARANCES:

For the Petitioner: Mr. L. F. Denison, Mount Pleasant, Texas; Mr. Hugh Carney, Atlanta, Texas.

For the Respondent: Lt. Col. Nicholas R. Voorhis, J. A. G. O., Washington, D. C.; Mr. Steve M. King, United States Attorney, Beaumont, Texas.

Be it Remembered, that upon the 18th day of February, A. D., 1949, came on to be heard in the above entitled and numbered cause a Habeas Corpus hearing before His Honor, Randolph Bryant,
20 Judge of the District Court of the United States for the Eastern District of Texas, situated and holding Regular Term at Tyler, Smith County, Texas; and,

That the following is a substantially true and correct transcript of the proceedings had during said hearing, with the exception that Respondent's Exhibit 1, being Court-Martial record of Petitioner, is not copied herein, but is being sent up in the original form introduced during said hearing; i.e.: photostatic copy.

MR. KING: Your Honor, I would like to have the Colonel here appear as counsel for the United States.

THE COURT: Yes. He is permitted to appear as a matter of comity.

MR. CARNEY: Your Honor, I have had Mr. Benson summonsed as a witness, and I would like to get his assistance in the trial of the case, be added as counsel.

THE COURT: All right.

MR. CARNEY: Would the Court like to hear a brief statement of the case?

THE COURT: Yes. I would like for you to outline the case.

STATEMENT OF CASE

Mr. CARNEY: This is a petition by Marton L. Whelchel, the young man sitting over here, in Habeas Corpus against his
21 detention in the Texarkana Correctional Institution. Marton L. Whelchel was in the Army and he was in Patton's Army in Germany. And about April 10, 1945, he was charged with rape on a German girl and was tried before a Court-Martial at Immerath, Germany, and was convicted and given the death penalty. Through the intervention of some of his friends, Congressman Patman, General Eisenhower reduced that to life imprisonment and he was sentenced to life imprisonment in the United States, and was confined at the Federal Penitentiary at Terre Haute.

The COURT: Tell me what happened. Was there a hearing upon the merits on that application before the District Judge up here?

Mr. CARNEY: No sir. That application was dismissed without prejudice.

The COURT: Well, as I recall the record, that application for writ was presented and denied and I thought an appeal perfected from it.

Mr. CARNEY: No. It was never passed on.

The COURT: And the appeal was dismissed?

Mr. CARNEY: There was never any appeal.

The COURT: Never was any hearing held upon the merits?

Mr. CARNEY: None at all. The writ was issued and the case was set for trial, but pending that setting, why, I found out——

22 The COURT: Well, there was no adjudication whatever?

Mr. CARNEY: No adjudication whatever, and I have an order here withdrawing it without prejudice.

The COURT: All right.

Mr. CARNEY: Dismissing it without prejudice.

The COURT: All right.

Mr. CARNEY: So that matter doesn't stand in the way at all. Now, at this trial at Immerath, Germany, on April 10, 1945, the defendant was represented by an appointed officer, Captain Madison, who doesn't appear to be a lawyer, but he represented him. The trial was very short. The record of the trial is here before the Court, all the testimony, and there was some testimony from the defendant's standpoint showing an alibi, but very weak; wasn't much to it I'll admit that, and he was convicted and given the death penalty, as I say. Now, shortly after he was convicted this man who represented him, Captain Madison—it was called to his attention that this boy wasn't in his right mind, possibly at the time.

The COURT: I remember the claim of amnesia, as I recall it.

Mr. CARNEY: Yes, and he had him examined by Dr. Pellettieri, the surgeon for the battalion. Dr. Pellettieri made a report in writing that in his opinion this boy was suffering from amnesia, of

the whole incident. In addition to that Madison obtained a
23 statement from his presiding officer, Lieutenant—now Captain —who is present here, Captain——

The COURT: What is your name, Captain?

Captain ROBERT GRAHAM: Captain Robert Graham.

Mr. CARNEY: Captain Robert Graham. Captain Graham made a statement in his opinion that this boy wasn't in his right mind at the time of the trial or at the time of the alleged incident.

The COURT: Was Captain Graham a member of the court-martial?

Mr. CARNEY: He was just this boy's immediate superior. Also Madison obtained a statement from Sgt. Goolsby who was a companion sergeant to this boy in the Army and had been with him all the way through, and Goolsby said in his statement that about two weeks before this incident the boy cracked up. And those things were presented to the court-martial after the court-martial trial, and five members of the court-martial said that the case ought to be reopened in spite of these things that went into the record and in spite of those the reviewing authorities refused to give him a psychiatric examination and reopen the case. Our whole point is that the court-martial law is unconstitutional.

The COURT: What do you base that on?

Mr. CARNEY: On this fact. The court-martial is composed of officers only.

24 The COURT: You needn't argue that.

Mr. CARNEY: I am not going to argue it, but the whole thing together makes it unconstitutional. It is composed of a class of officers only, men who have in mind not the things about seeing that a man gets a fair trial.

The COURT: I don't agree with that statement at all. You needn't waste any time arguing that.

Mr. CARNEY: I am going to offer proof of that.

The COURT: You can offer proof.

Mr. CARNEY: I am going to offer proof by the examining committee who changed the law and made it a law that an enlisted man can sit on the court.

The COURT: All right.

Mr. CARNEY: In addition to that, we say that being composed strictly of officers, the court is appointed by the General in command, the personnel of the court, the prosecuting attorney is appointed by the General, defense counsel is appointed by the General, and the whole set up and scheme is to go through with a formality there to maintain discipline in the Army regardless of the rights of the defendant.

The COURT: Well, all right.

Mr. CARNEY: Now, that is the point we make on that.

The COURT: All right.

Mr. CARNEY: But in this case, in this particular case, we say that the law was violated, the court-martial law was violated in this trial.

The COURT: You had better bear down on that because that is——

Mr. CARNEY: Naturally, Your Honor, I don't want to pass this other point up though.

The COURT: Well,——

Mr. CARNEY: That is the main point.

The COURT: All right. Now, what in general is your answer to this?

Mr. CARNEY: Let me read this just a moment, which portion we say——

The COURT: I thought you were just making your opening statement now. But we will go on with the hearing and the evidence in a minute.

Mr. CARNEY: Just a little short item here.

The COURT: All right.

Mr. CARNEY: This code is very solicitous of the fact that a man might not be in his right mind. There are many paragraphs. I am not going to read them all. But this one: "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

The COURT: All right.

Mr. CARNEY: Now, we say that when they refused to consider these statements of the doctor and of the Captain and of the Sergeant that this man was insane and the recommendation of five members of the Court, they violated this provision of this court-martial code.

The COURT: All right.

STATEMENT BY COUNSEL FOR RESPONDENT

Col. VOORHIS: Your Honor please, in general the defense will show that the interpretations which Petitioner's counsel has put on several letters is a very generous interpretation, and the letters do not say what he summarizes them as saying, in that the Company Commander in his letter attached to the letter of the defense counsel did not say that Whelchel was at any time insane. His sergeant did not say he was insane. The battalion surgeon did not say he was insane. The defense counsel after trial did make a request that the Petitioner, Whelchel, be given a psychiatric examination. He apparently made that request without knowledge of the fact that prior to trial on March 25th—and the trial was April 10th—on March 25th

he had received a thorough psychiatric examination by a neuropsychiatrist, which the battalion surgeon was not. The court after trial in concurring in the recommendation obviously had no knowledge that he had been accorded a thorough psychiatric examination prior to the trial. The request of the defense counsel
27 reached the reviewing authority after the reviewing authority had acted and approved the sentence and forwarded it for appellate review under the statute. It did reach theatre headquarters, General Eisenhower's headquarters, prior to his action on it, and his action shows that due to the unusual circumstances in this case he commuted the sentence on the recommendation of the theatre staff judge advocate. The man's condition due to alcohol on that evening was a contributing factor to his acts. Our position is that Whelchel was accorded every right and privilege to which he was reasonably entitled and at no stage of the proceedings was in any way denied anything to which he was entitled.

The COURT: That is a very clear statement of your position.

Mr. CARNEY: Your Honor, I would like to get a stipulation from counsel. You will agree that that psychiatric examination was never made after the statement I read into the record was presented?

Col. VOORHIS: Petitioner's counsel says the record of the trial was before the Court. I don't know whether it was or not, but I have here an authenticated copy of the entire record, the processing of the charges before trial, the appellate reviews and the consideration that took place. Included in it are the statements to which he referred.

28 The COURT: That will be admissible in evidence.

Mr. CARNEY: Yes. I have carefully read it over and there is not a word in it about the psychiatric examination after the first one.

The COURT: I think that record will be the best evidence we can have of the proceedings. It is admissible in evidence. But go ahead with your testimony.

Col. VOORHIS: I can offer it now for the use of Petitioner or later in the Respondent's case.

The COURT: That is just with you gentlemen. It will be admitted.

Mr. CARNEY: I have a copy of it.

Col. VOORHIS: Respondent's Exhibit 1.

(Photostatic copy of Court-Martial proceedings in question marked Respondent's Exhibit 1.)

Mr. CARNEY: I have special copies here taken from the record of these and I don't care, of course, to have to put in all that record, and if you will agree to let copies go in here—for instance, here is Robert Graham's statement.

Col. VOORHIS: Read the copies and the statements are in evidence.

The COURT: The statements are in evidence.

Col. VOORHIS: An easy way to refer to these exhibits is by a pencil paging in the lower right hand corner which runs consecutively, and Graham's statement is shown on page 132.

29 Mr. CARNEY: I have the page number of the records. I want to introduce the deposition of Dr. Pellettieri. This was taken on a waiver, Your Honor.

The COURT: I understand that. Does he claim to be a psychiatrist?

Mr. CARNEY: No, he is not. He is just a general medical practitioner.

ANSWERS OF DR. NINO M. PELLETTIERI TO DIRECT INTERROGATORIES PROPOUNDED BY PETITIONER

NINO M. PELLETTIERI, having been duly sworn, makes the following answers to direct interrogatories one to fourteen, inclusive, propounded to him by Petitioner in the above entitled and numbered cause:

DIRECT INTERROGATORY No. 1.

Please state your name, age and address.

ANSWER TO DIRECT INTERROGATORY No. 1.

Nino M. Pellettieri; age 43; 1126 North Latrobe, Chicago, Illinois.

DIRECT INTERROGATORY No. 2:

Please state what is your profession and how long you have been engaged in this profession and the degrees, if any, you have.

ANSWER TO DIRECT INTERROGATORY No. 2.

30 Physician; have been in the practice sixteen years. Have B.S. and M.D. degrees from Loyola and the A.B. from Creighton College.

DIRECT INTERROGATORY No. 3:

Have you specialized in any mental diseases or neuropsychiatric practice? If so, give the extent in length of time and experience had in such practice.

ANSWER TO DIRECT INTERROGATORY No. 3:

I have never specialized in psychiatry, however, I had some training in it and was psychiatrist for the Selective Service Board here in Chicago before I went on active duty.

DIRECT INTERROGATORY NO. 4:

Were you a Captain in the Medical Corps and surgeon in the 602nd Tank Destroyer Battalion and as such stationed in Germany in the spring of 1945?

ANSWER TO DIRECT INTERROGATORY NO. 4:

Yes.

DIRECT INTERROGATORY NO. 5:

Please state whether or not you remember a soldier named Marton L. Whelchel, Army Serial No. 18038433, Company C, 602nd Tank Destroyer Battalion.

ANSWER TO DIRECT INTERROGATORY NO. 5:

Yes.

DIRECT INTERROGATORY NO. 6:

If in answer to the foregoing interrogatory you state that
31 you knew Whelchel, please state whether or not you remember on or about April 23, 1945, making a psychiatric examination of said Marton L. Whelchel.

ANSWER TO DIREGT INTERROGATORY NO. 6.

I did not make a psychiatric examination of Marton; I did make a physical examination of the type the Army calls a shortarm examination; I examined his privates, for evidence of abuse. I asked him a few questions, but his answers were vague and he was negativistic.

DIRECT INTERROGATORY NO. 7:

If you answered the foregoing interrogatory, yes, please look over the attached copy of the report signed by you and state whether or not you remember making such examination and such report on and of Marton L. Whelchel."—This is the attached report.

The COURT: What is the substance of the report? You can offer the whole thing in evidence, but what is the substance of it?

Mr. CARNEY: Well, I will just read the last two paragraphs.

(REPORTER'S NOTE: While the last two paragraphs only were read into the record at this point, the entire statement is hereinafter copied for the information of the Court.)

32 "Medical Detachment

602nd Tank Destroyer Bn.,

APO #403, U. S. Army

23 April 1945.

201-Whelchel, Marton L. 18038433, Pvt. 602nd T D Bn.

Subject: Information in regards to the reopening of the case of Private Marton L. Whelchel 18038433, Co. C, 602nd T D Bn.

To: Commanding General, 89th Infantry Division APO #89, U. S. Army.

Private Marton L. Whelchel's entire behavior on the night of the 14th of March, 1945 was that of an insane or drunken individual, surely not that of a sane or sober man. His complete amnesia of the night causes me to think he either was so drunk he did not know what he was doing or that he had an epileptic episode. True enough his past history in this battalion does not bring out any previous episode but this could very well have been his first one.

My observations of the man after he committed this crime revealed that he never spoke of it and went about unconcerned and firmly convinced of his own innocence. Attempts by fellow soldiers and guards to make him talk about his exploits always brought out a negative answer. I am convinced that his negative answers and self assurance that he was not in serious trouble were the result of his amnesia of the whole incident.

33 Questioning his officers I was told that he recently had become a very troublesome individual in the company. In one incident he fired a fifty caliber machine gun in a rear area installation and when asked why he did it, he said he did not know. At another time he went to his platoon Commander and asked to be reduced from grade Technician 4th Grade to Private. When asked why he said he felt he could not hold the rating because he was not sure of himself.

Putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration.

(S.) NINO M. PELLETTIERI,
(T.) NINO M. PELLETTIERI,
Capt. Medical Corps, Surgeon, 602nd T D Bn.

A true copy:
(Signed) FRANK LATNIK,
WOJG, USA."

Mr. CARNEY: Now, that was made April 23, 1945 and that is the statement that was attached.

The COURT: That was after the trial?

Mr. CARNEY: After the trial and was attached by Madison
34 to his application for a re-examination.

The COURT: All right.

"Direct Interrogatory No. 8:

Doctor, do you have a present recollection now of the said Marton L. Whelchel and a recollection of his being charged before a court-martial with rape and of his conviction and sentence to death?

Answer to Direct Interrogatory No. 8:

Yes.

Direct Interrogatory No. 9:

If you answered the foregoing interrogatory, yes, please state your opinion based upon your observation of the said Marton L. Whelchel, your recollection of the facts to that time regarding the alleged offense, the conduct of the said Marton L. Whelchel just before and at the time immediately following the same, as to whether or not the said Marton L. Whelchel was mentally responsible for his acts at the time of the alleged occurrence of the rape and at the time of his trial before court-martial.

Answer to Direct Interrogatory No. 9:

In my opinion Marton Whelchel was not mentally responsible for his acts at the time of the alleged occurrence of the rape or at the time of his trial before court-martial.

Direct Interrogatory No. 10:

Assuming, Doctor, that you knew about the accusation
35 against Marton L. Whelchel, charging him with rape of a German girl on or about March 14, 1945, and assuming that thereafter he was tried by court-martial and convicted and given the death penalty, and further assuming that during said trial he was listless about the entire matter and denied any knowledge thereof and refused to cooperate with his counsel in his defense, causing his counsel to ask for a mental examination of the said Marton L. Whelchel by you, and from which you found and made a report in writing that in your opinion the said Marton L. Whelchel was suffering from total amnesia of the whole rape incident and knew nothing about it; then, in your opinion, state whether or not the said Marton L. Whelchel was mentally incapacitated to such extent that if he committed the act, he was not mentally responsible therefor.

Answer to Direct Interrogatory No. 10:

Assuming as true the facts stated in Direct Interrogatory No. 10, then, in my opinion the said Marton L. Whelchel was mentally incapacitated to such extent that if he committed the act he was not mentally responsible therefor.

Direct Interrogatory No. 11.

Assuming all the facts set forth in the foregoing interrogatory, state whether or not it is your opinion that at the time of the trial of the said Marton L. Whelchel, his mental condition was such
36 as to preclude him making a valid defense and assisting his counsel therein.

Answer to Direct Interrogatory No. 11:

In my opinion at the time of the trial Whelchel did not remember the incident in question and had a complete blackout with reference thereto.

Direct Interrogatory No. 12:

From your experience in the army, Doctor, please state if from that experience you saw and examined many soldiers who lost their mental faculties by reason of what is commonly known as a 'crack-up' from long continued duty in the campaigns against the enemy, rendering such soldiers mentally irresponsible for their acts.

Answer to Direct Interrogatory No. 12:

Yes. I examined and witnessed many such cases.

Direct Interrogatory No. 13:

If you have answered the foregoing interrogatory in the affirmative, please answer the following question: Assuming that at the time it is alleged Marton L. Whelchel raped the German woman, he had been in the army continuously in combat for a long time, more than three months, and that up until about two weeks before the alleged occurrence of rape had been a model soldier but about two weeks before the alleged rape occurrence he had seemed to crack-up and had fired the guns of his tank destroyer over the heads of his men
37 and had, shortly before the occurrence of the firing of the guns, gone to his Commanding Officer and told him he wanted to be demoted from Sergeant, appearing to the officer to be mentally unstable at the time, and appearing to Sergeant Goolsby to have cracked up mentally, and assuming further that on your examination of him shortly after his trial, it appeared he was suffering from total amnesia of the whole occurrence of rape, would or not it be

your opinion that the said amnesia was caused by this crack-up from combat fatigue?

Answer to Direct Interrogatory No. 13:

Yes. The battle fatigue was the trigger or the fuse that set off the crackup.

Direct Interrogatory No. 14:

Doctor, if there is anything in this case that you think of importance to relate that we have not asked you about, will you please so state it in answer to this interrogatory?

Answer to Direct Interrogatory No. 14:

Whelchel was a member of C Company, one of the gun companies of the 602nd Tank Destroyer Battalion. It saw considerable heavy action continuously from November 1944 on through March 14, 1945.

It served with a Ranger Battalion forming a task force ahead
38 of the main army forces in that sector from the time of the pushoff from Nancy to the Saar belt. From there it was transferred to the Second Cavalry to serve on reconnaisance mission through the entire Battle of the Bulge. Shortly before this incident C Company was returned to the battalion and continued fighting with the battalion. Therefore the men in the company were pretty much on edge all the way through.

(S.) NINO M. PELLETTIERI.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me, a Notary Public, in and for Cook County, Illinois, by Dr. Nino M. Pellettieri, on this 12th day of February, 1949.

(S.) ELLEN CARROLL,
Notary Public.

My Commission Expires December 19, 1950.
[SEAL]

Mr. CARNEY: Now, Your Honor, we want to specifically introduce these statements in the record. We won't read them to you

The COURT: That is the statements of Captain Madison,
39 Sgt. Goolsby and Captain Graham, or are you going——

Mr. CARNEY: That is correct.

The COURT: Are you going to use Captain Graham?

Mr. CARNEY: I am going to use him, but this was made then and I want to introduce it.

The COURT: All right.

Mr. CARNEY: Captain Matisin's statement is on page 134 of the record and we introduce it in evidence.

The COURT: What is the substance of that statement?

Mr. CARNEY: The substance of that statement is——

The COURT: What is the date of it?

Mr. CARNEY: Dated April 25, 1945.

The COURT: All right.

(Reporter's Note: Reporter has been writing the name of Captain Madison heretofore when it should have been Captain Matisin, according to the Court-Martial record, which discrepancy Reporter has just discovered)

STATEMENT OF CAPTAIN MATISIN

"APO 89 U. S. Army

25 April 1945.

Subject: Neuropsychiatric Examination of Private Marton L. Whelchel, ASN 18038433, Company C, 602 TD Bn.

To: Commanding General, 89th Infantry Division, APO 89 U. S. Army.

40 1. On 10 Apr 45, Pvt Marton L. Whelchel, 18038433, Co. C. 602 TD Bn, was brought before a GCM, tried, and convicted of a violation of the 92d AW (Rape). Pvt Whelchel was sentenced to be hanged by the neck until dead.

2. After announcement of the sentence, it was brought to the attention of the Defense Counsel by Captain Nino M. Pellettieri, MC. Surgeon, 602 TD Bn, who has had frequent contacts with Pvt Whelchel that he may be a victim of Epilepsy and that the crime may well have been committed during an epileptic episode, a situation which would, of course, render him irresponsible for his actions.

3. During my interview with the accused prior to the trial he appeared reticent and unconcerned about the entire situation. He told me there was nothing to add to his statement made at the investigation. I was unable to obtain any informaton of material consequence in my interviews with members of his company—no mention was made of his sanity. I was, in consequence, unable to introduce the issue during the trial. He was apparently not affected by his sentence.

4. In view of the above facts it is requested that the case be reopened and that Pvt Whelchel be admitted to a hospital for a thorough neuro-psychiatric examination.

5. Delay in submitting this request was occasioned by efforts of the undersigned to obtain additional information from the Medical Officer concerned. Statements of Capt. Pellettieri, Lt. Graham
41 and Sgt Goolsby are attached as inclosures.

(S.) JOSEPH J. MATISIN,
(T.) JOSEPH J. MATISIN,
Capt. 335th Inf.,
Defense Counsel.

3 incls:

1—Statement of Nino M. Pellettieri, Capt. MC.

1—Statement of Robert E. Graham, 1st Lt. 602d TD Bn.

1—Statement of Harry P. Goolsby, Sgt. Co. C, 602d TD Bn.

STATEMENT OF SGT. HARRY P. GOOLSBY

Mr. CARNEY: The application was evidently presented to these members of the Court. "The undersigned members of the General Courts Martial appointed by Paragraph 1, SO Hq 89th Inf. Div., dated March 45, by whom Pvt Whelchel was tried, concur in the request of the Defense Counsel." And it is signed by five members of the six member court. That appears on page 135 of the record. Now, Your Honor, I want to introduce the statement by Sgt. Harry Goolsby referred to in that application. It appears on page 133 of the record. This statement was made by Goolsby on April 24, 1945, and was addressed to the Commanding officer, 89th Infantry Division. "Private Whelchel was the driver of the Tank Destroyer
42 which I command. According to my own personal observation Private Whelchel was a perfect soldier up to about the 21st February, 1945. On this date Private Whelchel after having a small amount to drink got very quarrelsome with the men who had always been his best friends. He fired a fifty caliber machine gun over the head of his assistant driver. After this incident Private Whelchel seemed to lose control of himself and appeared to crack up mentally.

(S.) SGT HARRY P. GOOLSBY,
(T.) SGT HARRY P. GOOLSBY,
ASN 6262432,
Co. C, 602nd T D Bn.

Mr. CARNEY: Now, I will call Captain Graham.

CAPTAIN ROBERT GRAHAM, called as a witness by Petitioner, first having been duly sworn, testified as follows:

Direct examination.

By Mr. CARNEY:

Q. Your full name is Robert Graham, Captain Robert Graham. Where do you live?

A. In Galena Park, Texas.

Q. Were you in the army with Pvt. Whelchel?

43 A. Yes sir.

Q. What position did you occupy in the outfit that he was with?

A. Platoon leader. First Lieutenant, platoon leader.

Q. You were First Lieutenant and platoon leader?

A. Yes sir.

The COURT: Are you in the army now?

A. No sir.

The COURT: Where is your home?

A. Galena Park.

Q. Close to Houston.

A. It is in Texas, close to Houston.

Q. It is really surrounded by Houston now. I believe they incorporated all around you.

A. Yes sir.

Q. Captain Graham, first we will get your background. When did you first get in the army?

A. In January 1941.

Q. Were you an enlisted man?

A. Yes sir.

Q. You went in as an enlisted man, a private?

A. Yes sir.

Q. To start with. In 1941. Where did you live at that time?

A. In Galena Park.

Q. You lived at the same place. Your people lived there?

A. Yes sir.

44 Q. Did you have any brothers who went to the army?

A. Three of them.

Q. You had three brothers?

A. Yes sir.

Q. And where were you sent from there?

A. From——

Q. From your point of where you were taken in.

A. Brownwood.
Q. Sent to Brownwood?
A. Yes sir, 36th Division.
Q. How long did you stay there, do you remember?
A. Almost a year.
Q. Well, did you take the officer's training course any where?
A. In Camp Hood, Texas.
Q. Did you pass it, were you commissioned as an officer?
A. Yes sir.
Q. As a result of that. What was your commission?
A. Second Lieutenant.
Q. Then, afterwards were you promoted to First Lieutenant?
A. Yes sir.
Q. When did you go overseas?
A. In 1944, in about September.
Q. September of '44?
A. Yes sir.

Q. Well, how long after you got overseas before you went
45 into action?

A. I would say about two or three weeks.
Q. What army were you in?
A. That is, up until we got in France. We were in England and then went over to France in about September.
Q. What army were you in?
A. Patton's army, the 3rd Army.
Q. The 3rd Army?
A. Yes sir.
Q. What kind of a fighting outfit were you with, what were you called?
A. Tank destroyers.
Q. Tank destroyers.
A. Yes sir.
Q. That is some kind of a vehicle that is propelled——
A. It is similar to a tank, only the top is open. We had a 3 inch long rifle for, you know, made to knock out tanks, enemy tanks.
Q. How many did you have in a platoon, in your platoon?
A. We had four tank destroyers, two armored cars and two or three jeeps.
Q. All right. When you first went in there was Pvt. Welchel a member of that platoon?
A. Yes sir.

Q. This is the same Whelchel that is sitting here?
46 A. Yes sir.

Q. And he served under you then from then until the time of his trial?
A. Yes sir.

Q. What kind of a soldier was he?
A. He was a good soldier.
Q. Did you have occasion to know him intimately and his actions under fire?
A. Yes sir, I did.
Q. And every way?
A. Yes sir.
Q. Well, now, Captain, did anything happen to him prior to the time he was tried for this rape? Anything brought to your attention especially about him?
A. Well, about two weeks before the trial we were stationed—we had been leading a combat team with our platoon and we were put in a reserve position for the night in Germany. I believe it was Neurberg. When I first noticed anything he came to me and asked to be—just walked in to the room where I was there and appeared to be intoxicated, and asked to be reduced, and I thought maybe he was tired, and maybe had a drink, and I told him to go to bed.
Q. Was he a sergeant at that time, Technical Sergeant?
A. He was a T-5.
A. T-5?
47 A. Yes sir.
Q. What position did he hold by reason of being a sergeant in that tank destroyer?
A. He was the driver.
Q. How many more men in that tank destroyer with him?
A. Four.
Q. Was Sgt. Goolsby one of them?
A. Yes sir.
Q. Had he been with him a long time?
A. Longer than I had. They had been in the 2nd Division.
Q. You didn't pass on that right now?
A. No sir.

The COURT: You say he was drunk at the time or intoxicated?
A. He appeared to be, yes sir.
The COURT: All right.

Q. Up to that time had you ever noticed him to be a drinking man?
A. Well, not very much; he had, you know——

The COURT: Yes, I know soldiers will take a drink occasionally. I have personally observed that.

Q. But he had never been drunk before that you know of?
A. No sir, not that I know of.
Q. So then what happened to him about that time?
A. Well, I took him,—I sent him to his room, but he didn't stay

there, and he picked fights with two or three of his friends,
48 and fought boys he had lived with and been with for years.

Then we tried to calm him down, you know; in a combat situation like that you just can't call the MPs or somebody, you know, and so after he did that, then we thought he had calmed down and the next thing I knew I heard the machine gun firing, and I went outside and one of the boys was pulling him out of there; he had fired over his head. So I put him in one of the jeeps and took him to the company commander. It was about two miles or three miles away, and I asked him then if he—I told him that I thought we ought to take him to the Medics or some place, because—well, what I told him, I told him I thought he was crazy instead of being drunk.

Q. You attributed his actions then to something other than just being a little drunk?

A. Yes sir, I did.

Q. He was so different in his way and so forth?

A. Yes sir.

Q. Did you talk to him about that incident afterwards, in two or three days, about the firing of the gun?

A. Yes sir. The next day or so. Of course, he was—the Captain kept him there and reduced him to a private and put him in another platoon, and I saw him in the next day or so and questioned him.

Q. Did he know anything about that incident?

49 A. He said he didn't remember anything about it.

Q. Were you satisfied at the time he was telling you the truth about it, that he didn't actually remember?

A. Yes sir.

Q. Now, Captain, at that time you say that you noticed something wrong with him. Did you have anything done about it in any way? You didn't have him examined or anything at that time?

A. No sir. No sir, we didn't.

Q. That was about two weeks before this alleged occasion of the rape of the German girl?

A. Yes sir. He went into the other platoon.

The COURT: Are you a drinking man?

A. Sir?

The COURT: Are you a drinking man?

A. Yes sir.

The COURT: Were you ever drunk enough not to know what happened the night before?

A. No sir, I haven't been.

The COURT: Well, you haven't drunk much then, I am afraid, but go ahead.

Q. You say in your opinion there was something other than the drinking the matter with that boy at that time?

A. Yes sir.

50 The COURT: Are you familiar with the fact that there is a thing known as toxic amnesia resulting from excessive use of alcohol?

A. I am not too familiar with that.

The COURT: Well, there is such a condition. It is well recognized by the medical authorities. But go ahead, Judge Carney.

Q. Well, after that now, about two weeks after that this alleged rape occurred. Do you remember about that incident?

A. Yes sir.

Q. Were you present at his trial before the court-martial?

A. Yes sir.

Q. Did you notice his demeanor and his actions with his counsel at that time?

A. Yes sir. He didn't appear to be concerned at all with the trial, or even after the sentence was passed.

Q. Now, he wasn't drinking then, was he?

A. No sir.

Q. He had been in the guardhouse two weeks. He hadn't had an opportunity to be drinking, had he?

A. No sir.

Q. You say at that time he appeared to you in that condition. Well, from what you saw of him there and his actions, will you tell the Court whether or not at the time of his trial that man was mentally responsible in your opinion?

Mr. KING: We object to that, Your Honor. I don't think
51 the witness is qualified.

The COURT: I will sustain the objection to it. You can testify if you noticed any abnormalities in his behavior or conduct or any manifestation he made himself, anything that was unusual about his behavior, his appearance or anything of that kind. Just what you saw. I don't think you are qualified to express an expert opinion unless you give a whole lot of facts upon which it is based. But did you notice anything unusual about his conduct or appearance during the trial?

A. Yes sir. Well, what I noticed particularly was when he was sentenced. I mean, I know when they say sentenced to be hung by the neck until dead, I know it would make me a little nervous, and you know, at least, and it didn't—just like——

Q. Didn't faze him?

A. Didn't faze him at all.

The COURT: He didn't display any emotion about it?

A. No sir, he didn't.

Q. Did he seem to realize the import of what that sentence was?

A. No sir, he didn't.

Q. Under those facts we ask again the question——

Mr. KING: Your Honor, I think that is objectionable.

The COURT: Well, I think it is.

Mr. KING: We are trying it before the Court.

52 The COURT: Well, did you notice anything else unusual about him there during that trial?

A. No sir.

The COURT: I don't think he is qualified to express an opinion.

Q. For the purpose of the record we will ask that he give his answer.

The COURT: All right.

Q. From what you did observe and from what you saw and from what you have related to the Court, from that, and from your former knowledge of Whelchel and his demeanor and actions and conduct which you say you had known intimately for some three months, will you tell the Court whether or not in your opinion he was mentally responsible at the time of the trial?

Mr. KING: We object, Your Honor.

The COURT: I will let him go ahead and answer since this is before the Court. I think it is objectionable, but go ahead.

Mr. KING: Yes, I understand.

A. No sir, I don't think he was mentally responsible.

The COURT: Did you make any representation to this court to that effect?

A. Not at the court, no sir.

The COURT: Why didn't you?

A. Because it hadn't occurred to me until after the time

53 of the trial.

The COURT: You knew the court would pay attention to any representation of that kind you made, didn't you? I am talking about as an officer in the army. If you had that belief or that impression why you didn't make some representation to this court to that effect, especially when this man was a member of your command.

A. Sir, I was a character witness at the trial and—I mean in fact, I wasn't any——

The COURT: I am not asking you what kind of a witness you were. I say if you had that impression at that time, why didn't you under

your responsibility to that man as an officer make that representation to the members of the court?

A. Sir, we made this deposition immediately after the trial was all we could——

The COURT: I am asking you why you didn't make that representation to the court when you were there before it. If you had that impression and didn't do it you have got a darn poor conception of your responsibility as an officer.

Mr. CARNEY: We object to that statement by the Court and say it is not fair to the witness.

The COURT: Well, will you tell me why you didn't make that statement if you had that impression, representation if you had that impression?

A. Sir, I got the impression—I was telling about—was when
54 he was sentenced and I didn't have—I couldn't make any statement to the court at that time. That was as he was sentenced there, when he was sentenced, when they passed the sentence on him.

The COURT: You mean that you couldn't have talked to the court personally and made that representation in writing to them?

A. We did after the trial, sir

The COURT: Well, all right.

Mr. CARNEY:

Q. Immediately after the trial you did that, didn't you?

A. Yes sir.

Q. I believe that was dated the 24th, your statement—No, the 25th.

The COURT: What was his statement at that time? Do you have a copy of it there?

Mr. CARNEY: How is that?

The COURT: Do you have a copy of his statement?

Mr. CARNEY: Yes sir.

The COURT: What does he say in there?

Mr. CARNEY: "In my own personal opinion Private Morton L. Whelchel was mentally unstable. For instance, on or about the 21st of February, 1945, my platoon was in a reserve position near Neurburg, Germany. Private Whelchel who was an occasional drinker,
but had never caused any trouble, came to me apparently
55 intoxicated and asked to be reduced from the Tec 4th Grade rating he then held to Private. I sent him out and told him to go to bed and think it over. He went out and instead of going to bed proceeded to pick fights with two or three of his best friends. Later on he went out to one of the Tank Destroyers and fired the 50 caliber machine gun over one of the men's head. I then took him

to the Company C. P. where he quieted down. The next day he was reduced and sent to the 1st Platoon. When questioned about the incident of the day before he had no knowledge of it."

The Court: You testified as a character witness at the trial and you didn't volunteer any of this information that you detailed in that letter to the court at the time you appeared as a witness.

A. No sir.

The Court: All right.

Mr. Carney:

Q. Now, then, you say the trial was over when you had finally concluded in your mind that he was mentally unstable, that is, as he was being sentenced then was your final impression that man was not mentally stable?

A. Yes sir.

Q. And, of course, at that time you had no opportunity to tell the court anything about it, but you did tell his attorney just as soon as you possibly could and you gave him a statement and that statement went into the record.

56 The Court: All right.

Q. Now, Captain, you say that prior to the time of this first incident this man had been a soldier under you.

A. Yes sir.

Q. Had you ever noticed anything up to that incident that made you a little leery about his mental condition? Up to the time of that? Had you ever noticed that before that time?

A. No sir, not particularly.

Q. That was the first time?

A. Yes sir.

The Court: All right. Is that all?

Mr. Carney: That is all, yes.

The Court: Any questions?

Mr. Carney: Just a moment, Your Honor.

Q. By the way, did you know Captain Matisin the man that represented him?

A. I met him while he was—I met him once before the trial and then at the trial, yes sir.

Q. Do you know whether or not he was an attorney at law?

A. Whether he was a lawyer?

Col Voorhis: Your Honor, there is no issue in this case about that.

Mr. Carney: That is your position about.

THE COURT: It doesn't make any difference whether he was or whether he wasn't. If he knows, he can state it.

A. No sir, I don't know.

57 Mr. CARNEY: You don't know.

The COURT: All right.

Mr. CARNEY: I want it in the record that the attorney for the Judge Advocate General's Department says he doesn't know.

The COURT: All right.

Mr. KING: It is not required.

The COURT: I understand. It doesn't make any difference one way or the other.

Mr. CARNEY: My idea, Your Honor, is that they ought to be willing to present all the facts here that we don't know and can't find out.

The COURT: I think they are willing to do that.

Mr. CARNEY: He ought to know whether he was a lawyer.

The COURT: I don't know how he would know if this man who served with him didn't know.

The WITNESS: I didn't serve with him.

The COURT: Whether he was a lawyer or not a lawyer doesn't make any difference.

Mr. CARNEY: We disagree with Your Honor. We say that if this man had been a lawyer he probably would have brought this matter up before he did. But being an officer without any legal training this man wasn't half tried, wasn't half defended. You can read that record and see that.

The COURT: Well, they can't go out and get lawyers to represent these men in times of war, and that is not required and it

58 doesn't make any difference one way or the other whether the officer appointed to represent him was a lawyer or not. But that is all on direct examination of this witness?

Mr. CARNEY: That is all.

CROSS-EXAMINATION.

By Col. VOORHIS:

Q. Captain Graham, in the letter you wrote the Commanding General of the 89th Division, was that written at the request of the defense counsel?

A. No sir.

Q. It was included——

A. Doctor—Pardon me.

Q. It was included as an exhibit or inclosure to his letter, was it not?

A. Yes sir.

Q. How did you come to write it?

A. Dr. Pellettieri, and I—at the time of the trial—in other words, at the time of the trial I was still in combat. You know, the war wasn't over yet. And we were still pushing on forward to Czechoslovakia there, and so we were about 300 or 400 miles from the place where they had the trial, which was in Germany. So going back from the trial Dr. Pellettieri and I were talking about it.

The COURT: Did Dr. Pellettieri appear as a witness in the trial?
59 A. Yes sir.
The COURT: And testified before this general court-martial?
A. Yes sir.
The COURT: All right.

Q. Now, Captain Graham, in your letter did you say anything about your reaction to his conduct during the trial, or at any time before sentence was pronounced?
A. No sir. I didn't.
Q. Who was the accusor in this case?
A. In this case?
Q. Yes, who brought the charges against Whelchel?
A. It fell my duty to investigate the case.

The COURT: He asked you who brought the charges against Whelchel, Captain Graham.
Mr. CARNEY: The record speaks for that.
The COURT: Well, he can answer that question, if he knows. Can you answer that?
A. No sir, I can't.
Mr. CARNEY: The record shows who that was.

Q. Is that your signature?
A. Yes sir.
Q. Now, I will ask you to look at these original charge sheets and ask you who the accusor of Whelchel was.

The COURT: What is your answer, Captain?

A. I signed these charge sheets, yes sir.

60 The COURT: And you swore to them, did you not?
A. Yes sir.
THE COURT: Well, that is enough, Colonel.

Q. The page reference in Respondent's Exhibit 1 to the charge sheet is page 26 through page 29. The signature of Robert E. Graham as accusor appears on page 28 as does his oath.
The COURT: All right.
Q. No further questions.

RE-DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Captain Graham, you say that it became your duty to do that?
A. Yes sir.
Q. Is that the duty under military law of the commander to file charges where complaints are made to him?
A. Sir, at that time I was the only officer in the company present. This German man made the complaint to the Captain. He had to leave on a tactical mission and left me to bring up the company, and he told me to investigate, and with the battalion commander who came down there we investigated this that morning and then I moved on out, left Whelchel with the reconnaissance company.
Q. Ordinarily it would have been the Captain's duty. You were the lieutenant.
A. They usually appoint an investigating body.
61 Q. But you were told by your Captain to make the investigation and to file the charges?
A. Yes sir, I was.
Q. That is all.

RE-CROSS EXAMINATION.

By Col. VOORHIS:

Q. You made an investigation?
A. Yes sir.
Q. And at the end——
A. That investigation that morning, yes sir.
Q. And at the end of the investigation you preferred charges?
A. Yes sir, I signed that.
Q. And swore to them?
A. I signed that charge sheet.

The COURT: Are you gentlemen through with the Captain?
Mr. CARNEY: Yes sir.
The COURT: Are you through with him?
Mr. KING: Yes.

CARL M. BRADLEY, called as a witness by the Petitioner, first having been duly sworn, testified as follows:

62 DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Is your name Carl Bradley?
A. That is right.

Q. Where do you live, Carl?
A. Six miles north of Queen City.
Q. How old are you?
A. 57.
Q. How long have you lived there?
A. Well, I have lived there all my life.

The COURT: Carl Bradley is your name?
A. Yes sir.
The COURT: I didn't get it clear.

Q. Do you know this boy here Marton L. Whelchel?
A. Yes sir.
Q. How long have you known him?
A. All his life, I guess; every since he was any size.
Q. How far have you lived from him?
A. About three quarters of a mile.
Q. Did you know his father?
A. From 1911 to 1926.
Q. Did you know his grandfather?
A. Yes sir.
Q. Have there been any evidences of insanity in the father and grandfather that you noticed?
63 A. Yes sir.
Q. Before his death, the grandfather, about how many years was he considered by the community there as being insane?

Col. VOORHIS: Your Honor please, is that a reasonable question?
The COURT: I don't think it is material, but I will let him answer.
A. Something like three years.
The COURT: How old was he?
A. His grandfather?
The COURT: Yes.
A. He was around 80 when he died.
The COURT: All right.

Q. Now, then, the boy's father,—what was his first name?
A. Luther.
Q. Did you know him intimately?
A. Yes sir.
Q. Have many personal and business transactions with him?
A. Quite a few.
Q. Did you ever notice anything out of the usual in his conduct in that community which might indicate a disordered mind?

Mr. KING: We object to that.
The COURT: I don't think it is material at all, but I am going to let him answer; get everything he can in the record he wants. Go ahead.

A. Well, when I first knew him, the first years I knew Mr.
64 Whelchel he was a very quiet man; didn't have anything to say much. The last 18 months or two years of his life he was more or less irritable and seemed to be hard to get along with; harder to get along with than he had been.

The COURT: Was there any complaint of lunacy filed against him to your knowledge?

A. No sir.

The COURT: Was he ever committed to an institution?

A. No sir.

The COURT: Was he ever restrained in any way?

A. Well, not that I know of.

Q. Well, did you ever know any incident where he attacked people and had big fights with them?

Mr. KING: We object—well——

A. Yes, I have.

Q. After that did you talk to him about the matter?

A. Yes sir.

Q. Did he appear to have any knowledge of what went on during those fights?

A. He told me he did not.

Q. He told you he did not.

The COURT: Was he a drinking man?

A. Sometimes he drank.

Q. Well, these incidents you are talking about, did he attribute them to drink in any wise? Did anybody ever attribute
65 them to drinking?

A. Not that I know of.

Q. Now, then, Mr. Whelchel——

The COURT: Bradley.

Q. How often did he have these spells when he would be on these rampages, get in fights and get in difficulties with his neighbors and would never know about it? How many of them did you ever know about?

A. A couple of times that I remember.

Q. Well, then, at the time of his death, just before he died what happened then?

A. You mean in the last—the case with the woman?

A. Yes.

Q. Well, you know, his mother was sick. Luther's mother was sick for quite a bit there, and Mrs. Barnwell came there to see his

mother and he met her. He came down to his mother's house and give her a cursing, I understand, and told her to leave and not come back.

Q. Did he after that time state to you that he didn't remember anything about that procedure and go over and apologize to the Barnwells for that?

A. Yes, he did.

Q. Taking all those things into consideration, Carl, will you tell the court whether or not in your opinion that man had insane periods in his life in which he wouldn't know what he was
66 doing?

Mr. KING: We object to that.

Q. And was very violent?

The COURT: I will let him answer. Go ahead.

A. Judging from his own words and from his own action he didn't know, and the doctor that attended him——

Mr. KING: Just a minute.
The COURT: That is objectionable.
Mr. CARNEY: We want to prove one statement by the doctor.
The COURT: Bring the doctor here.
Mr. CARNEY: What doctor was that?

A. Dr. Kidwell.
Q. He has been dead for many years. What year was that?
A. In 1926.
Q. Did Dr. Kidwell come to wait on him?
A. Yes sir.
Q. Mr. Whelchel killed himself by taking poison, didn't he?
A. That is what the doctor told me.
Q. Did the doctor make any remark to you about that at that time.

Mr. KING: We object to it.
The COURT: I will let him answer.

A. I asked the doctor what he thought of his condition; he says, The man is going to die", and he says, "It is better that he die than to get well." He says, "If he was to get well," he said, "He is crazy and he would kill some one else."
67 Q. Said he was crazy and would kill somebody?
A. Yes sir.
Q. That is all.

The COURT: You don't have any questions, do you?
Mr. KING: No.
The COURT: Stand aside.

The COURT: Are you willing to let the record show that T. J. Barnwell would testify to similar effect as the previous witness?

Mr. CARNEY: We are.

The COURT: Is that satisfactory to you, Colonel?

Mr. KING: Pardon me. I didn't hear what you said.

The COURT: Judge Carney said this is similar testimony to that of Mr. Bradley. Are you all willing to admit that if he testified, he would testify to the same effect as the previous witness?

Col. VOORHIS: As to the father and grandfather?

Mr. CARNEY: Yes.

The COURT: All right. Let the record show that.

Mr. CARNEY: I want to introduce and call to the Court's attention especially part of that record, two sentences out of the examination, psychiatric examination of Marton L. Whelchel made by Nathan P. Segel, Captain Medical Corps, Division neuropsychiatrist, before he was tried.

68 The COURT: All right.

Mr. CARNEY: On page 75 and 76 of the record and in the report it says here under heading of Orientation: "Mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Bellevau intelligence test he scored a mental age of 11 years and five months and an IQ of 71."—On page 76 of the record and part of the same examination and report Captain Segel under summary and conclusions, he says—this sentence we introduce: "Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information."

The COURT: Well, the whole report is in the record.

Mr. CARNEY: Yes, sir, in the record. I just read that, call that to your attention.

MARTON L. WHELCHEL, Petitioner, first having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Is your name Marton L. Whelchel?

A. Yes sir.

69 Q. Marton, where did you live before going into the army?

A. I lived out of Queen City in Cass County.

Q. When were you inducted in the army, Marton?

A. In January of '41.

Q. In January of '41, and after you were inducted in the army where did you serve?

A. Well, I served at Dodd Field, Texas, Fort Sam Houston, Texas; Brownwood, Texas; Camp Hood, Texas; Camp McCoy, Wisconsin; Camp Forrest, Tennessee; Camp Kilmer, New Jersey; Fort Dix, New Jersey.

Q. From there where did you go?

A. Went to England.

Q. How long did you s-ay in England?

A. I am not certain. Somewhere around a month.

Q. From England where did you go?

A. We went to France.

Q. In whose army were you placed; what army was that?

A. General George S. Patton.

Q. How long after you reached that army before you got in battle?

A. Well, sir, I wouldn't say for sure, but a couple or three weeks. Something like that.

Q. And Marton, the record shows that you were accused of rape on a German woman, alleged to have occurred in March, 1945. Now, from the time that you first had combat service in Patton's army were you continuously up until that time in combat?

70 A. Yes sir. I was never out of the combat zone.

Q. How many battle stars did you have?

A. Well, sir, I don't know. I never got any record of my service or anything. It don't state on the record of my trial or anything, but I think I participated in either four or five major battles.

Q. You think you are entitled to either four or five battle stars.

A. Yes sir.

Q. You, of course, haven't got any record of them.

A. No sir.

Q. You heard Captain Graham's testimony that about two weeks before, it is charged you raped this German woman, something seemed to happen to you and that you shot the guns of the machine one night. Do you remember that incident, Marton?

A. No sir. I remember what the men in the company told me. They told me over and over several times, reminding me of the incident.

Q. You have now no present recollection of having shot those guns?

A. No sir.

Q. But you do remember you were told by the boys that you did do that?

A. Yes sir.

71 Q. Up to that time, Marton, had you ever had any mental trouble in any way up to that time?

A. No sir, not that I know of.

Q. Had you faithfully carried out your duties as you could as a soldier?

A. Yes sir.

Q. You were a Technical Sergeant, I believe, at that time?

A. Yes sir.

Q. Now, do you remember the incident of going to Captain Graham and asking to be demoted from sergeant?

A. No sir.

Q. You don't remember anything about that. Have you heard about that since?

A. Yes sir. I have heard of it. I have a statement of that showing that right in my possession.

Q. Since you have been in prison you have been furnished with a copy of the record and you have seen those things in the record?

A. Yes sir.

Q. Marton, you were charged with going into a house with a soldier named Spohn and raping two German girls. Do you have any recollection of doing that?

A. No sir.

Q. Have you ever had any recollection of having done that?

A. No sir.

72 Q. The record shows you were tried by court-martial about April 10. Have you a present recollection of your trial, who was your lawyer?

A. Well, sir, the only thing I have a record of my trial. That is all I have got to go by.

Q. You have read the record of the trial?

A. I have a record of my trial in my possession.

Q. Independent of that record, have you got any personal recollection now about that trial, what happened?

A. No sir. Only what I have read from the record is the only recollection I have about it.

Q. Now, Marton, there has been some talking here about this incident of shooting off the guns, that you were just drunk at that time. Do you ever remember being drunk about that time?

A. No sir. I never practiced drinking to- awfully much. I drank occasionally but conservative. I never went——

The COURT: Hadn't you been previously convicted by court-martial for drunkenness prior to this transaction?

A. Well, sir, I was convicted by summary court-martial for being AWOL.

The COURT: And drunkenness?

A. And drinking and resisting arrest, I believe it was, in a public place.

Q. That was how long before this?

73 A. It was on my first enlistment in the army.

Q. On your first enlistment?

A. Yes sir. When my enlistment run out they didn't call me in the orderly room or anything to review it or anything.

Q. You don't remember what date that was, that summary court-martial?

A. No sir.

Q. Has Your Honor got the date there any where?

The COURT: I just saw the record. I don't have the date before me. But go ahead with your examination. I don't know what the date was.

Q. I see it in Segel's statement here. It was in 1943. Was this the only incident you ever had while in the army?

A. Yes sir.

Q. The only court-martial you ever had?

A. Yes sir.

Q. How much punishment were you given for that?

A. I was given the maximum, 30 days.

Q. 30 days in the guardhouse?

A. Yes sir.

Q. You spent that in there and served your sentence?

A. Yes sir.

Q. Since that time you hadn't ever been arrested?

A. No sir.

The COURT: Where did you serve that sentence?

74 A. In my battalion guardhouse.

The COURT: Whereabouts?

A. Camp McCoy, Wisconsin.

Q. Since you had been overseas and fighting there in Patton's Army, had you ever been accused of being drunk or disorderly?

A. No sir.

Q. You tell this Court that you never had drunk heavily?

A. No sir.

Q. —up until the time of this rape charge. You don't know whether you did then or not, do you?

A. No sir.

Q. Shortly before that time had you had any symptoms of being under an extraordinary strain of any kind by reason of your battle and being in battle?

A. Well, sir, it just—you couldn't tell. One day you might hit it heavy and the next day you might hit the opposition light.

The COURT: What was the general route of the advance of your combat unit?

A. I don't know, sir.

The COURT: What general route did you travel? What towns did you go through?

A. I know about two towns. One of them was Frankfort. One of them was Frankfort. We went through Nancy, France.

75 Q. According to Captain Graham——

The COURT: I was asking him.

A. I don't remember what route we taken.

The COURT: What town was it where this thing happened?

A. I don't know, sir. My record of trial shows Immerath.

The COURT: Were you stationed there, or were you just passing through, or what?

A. I don't know, sir.

The COURT: Do you recall whether you were drinking that night or not?

A. Well, sir, in my mind I really don't recall. I was told by men in my company that I had been drinking and had been in a card game that night.

The COURT: All right.

Q. Now, you have been confined in the penitentiary since the date of that trial?

A. Yes sir. Almost four years.

The COURT: Where were you confined over there?

A. Well, sir, about the first place that I know they had me confined was in the deathhouse at La Mons, France, in the death cell there.

The COURT: How long did you stay there?

A. Almost six months, sir.

The COURT: Where did you go from there?

A. Went out to the Lorre DTC, disciplinary training center.

76 The COURT: How long did you stay there?

A. I only stayed there a month or so. I was waiting shipment back to the states.

The COURT: Where were you taken from there, what port, Brest or Bordeaux or Marseille or where?

A. I am not sure.

The COURT: What ship did you come back on?

A. I don't know.

The COURT: Where were you taken when you landed in the United States?

A. We were taken to New Cumberland, Pennsylvania.

The COURT: How long did you stay there?

A. Two or three days.

The COURT: At what place were you confined there?

A. Just in the disciplinary barracks.

The COURT: What place were you taken from there?

A. U. S. Disciplinary Barracks—Federal Penitentiary, Terre Haute, Indiana.

The COURT: How long were you in there?

A. From February, 1946, to August, '48.

The COURT: Who filed your writ of habeas corpus up there?

A. Mr. Covey I believe it was, sir.

The COURT: How did you get in touch with him? Did you do it through the prison authorities?

A. Yes sir. They would let me write him if I wished to write him.

77 They would let me write a special purpose letter.

Mr. CARNEY: I will explain that.

The COURT: Just a minute, Judge Carney. Let me question him. Did you write him and did he advise you there in the prison?

A. Yes sir. I wrote him and he advised me there in the prison.

The COURT: And you gave him the facts upon which to base your application for petition for writ. Is that correct or not?

A. Well, no sir, I don't——

The COURT: Well, do you say that is or isn't correct now? Did you give him the facts upon which to base his application for writ of habeas corpus?

A. No sir.

The COURT: You didn't?

A. No sir.

The COURT: You don't know where he got those?

A. I gave him my record of trial is all.

The COURT: And asked him to file this petition?

A. Yes sir.

The COURT: How long were you confined there?

A. At Terre Haute?

The COURT: Yes.

A. I believe it was February, '46, to August of '48.

The COURT: And you have been at the Correctional Institution at Texarkana since then?

78 A. Yes sir.

The COURT: You have never had any trouble at any time during your period of confinement as I read your record.

A. No sir. I have never had any disciplinary action or action of any kind.

The COURT: Never had any conflicts of any kind?

A. No sir. I have never had an argument since I have been in prison.

The COURT: And being in prison you didn't have any opportunity to obtain anything to drink, I assume.

A. No sir.

The COURT: All right.

Mr. CARNEY:

Q. I believe you say, Marton, in answer to questions from His Honor, while you were accused and tried according to the records over in Germany, the next you knew you were in a death house in France.

A. Yes sir. That's the next I knew. That was the first place I knew until they got me in the death house there and I stayed there almost six months and I got pretty settled there.

Q. You do have a present recollection of being in that death house now. You can remember that?

A. Yes sir.

Q. But between that point and the place back to where you were tried, have you got any recollection where you went, where
79 you were placed; anything about it?

A. No sir.

Q. I believe that is all.

The COURT: Any questions?

Col. VOORHIS: Just a couple, Your Honor please.

CROSS-EXAMINATION.

By Col. VOORHIS:

Q. What was your grade in the army prior to reduction?

A. I was Technician 4th Grade.

Q. Now, Captain Graham referred to you as Technician 5th Grade.

A. Well, sir, I had been put up. I was 5th grade technician before that, and I had been recently promoted.

Q. Then you were Tec 4th Grade?

A. Yes sir.

Q. Were you ever a technical sergeant?

A. I don't know what a technical sergeant is. I never heard of it in the army.

Q. Well, it is an enlisted man 2nd grade. Were were you on April 22nd of 1945?

A. I don't remember. I couldn't place the date.

Q. Did you write your mother occasionally while in the army?

A. Well, sir, yes sir. I guess I did.

Q. If I showed you a letter from your mother to some one else

that said she had received a letter from you dated April
80 22nd, would that refresh your recollection that you wrote her a letter immediately after your trial or within a week or so after you- trial?

A. Well, sir, I don't know whether it would or not.

Q. Do you recognize that writing?

The COURT: Is that your mother's handwriting?

A. No sir. That is not my mother's writing.

Q. Is that your mother's name?

A. Yes sir.

Q. Do you or do you not now know whether you wrote the letter referred to in this letter?

A. I do not.

Q. Does your mother write?

A. Yes sir. I receive letters from her now.

The COURT: Well, did you write her after the outcome of this trial?

A. Well, sir, I don't know whether I wrote her or not.

The COURT: Did you get this letter from her?

Col. VOORHIS: This is not a letter to him, sir.

A. It is the first time I ever saw the letter.

The COURT: Did you write your mother after the trial?

A. I don't remember writing her after the trial. The time I wrote her was down at La Mons.

The COURT: That was immediately after your trial when you were confined there?

81 A. I don't know how long after I was confined there.

THE COURT: All right.

Col. VOORHIS: I have no further questions.

Mr. CARNEY: That is all. That is all, Your Honor, from the Petitioner.

PETITIONER RESTS.

The COURT: Do you desire to argue this?

Mr. CARNEY: Yes, I would, Your Honor, shortly.

The COURT: All right. Proceed.

ARGUMENT ON BEHALF OF PETITIONER

Mr. CARNEY: As I stated in the beginning, Your Honor, the law is pretty well settled now that a court such as this may inquire into a charge of this nature under the due process law of the Fifth Amendment. It has been held by the Supreme Court of the United States that due process under the Fifth Amendment applies to a soldier.

The COURT: Well, we will concede that.

Mr. CARNEY: Concede that. All right. And also it has been held by the courts that a failure to follow the law as laid down in the code for the benefit of a soldier is want of due process, if it is a material and substantial nature—if it is of a material and substantial nature. Do you want argument on that?

82 The COURT: Just whatever you wish to argue.

Mr. CARNEY: I thought you might concede that like you did the other. Maybe counsel will. Will you concede that?

The COURT: He will concede that that regulation you read from exists.

Mr. CARNEY: You what?

The COURT: I assume that he will concede that that regulation you read from exists. It is the natural concern of any tribunal to see that any person tried for a crime is responsible for the crime with which he is charged, and this record demonstrates that every practicable precaution under military law had been complied with, because he was given a psychiatric examination before the trial and found competent for trial.

Mr. CARNEY: That is right. Now, then this code has a good many provisions in it. The law makers were very zealous to see that nobody who wasn't in mental condition was tried for a crime by court-martial, and I am not going to attempt to read all these things to Your Honor.

The COURT: Well, here is your trouble, Judge Carney. The record shows that out of an abundance of precaution and in conformity with that regulation that these proceedings were had in accordance with the general rules and regulations providing for the discipline of the military forces. And they made this examination and

83 found he was responsible for his crime and tried him and gave him every right to which he was accorded or entitled. And these things, statements of Captain Pellettieri and Captain Graham and Sgt. Goolsby are intimations of their individual belief that the man is probably not responsible, and if they were brought to the attention of the Commanding General, I think it was within his discretion to determine whether or not they merited any further action and that he was not obligated to order a new trial or commute sentence or anything else based on such flimsy grounds. I don't think this man was deprived of anything to which he was entitled.

Mr. CARNEY: Let me see if I can convince you against your will.

The COURT: I don't believe you can. He has been accorded every right to which he was entitled.

Mr. CARNEY: Let's see if he was. Let's examine that. That is a pretty broad statement.

The COURT: The thing about it, it comes down to—I can understand how these statements of Captain Pellettieri and Captain Graham and Sgt. Goolsby were made, but they were just individual beliefs without any basis in fact.

Mr. CARNEY: That is sufficient under this law to call it to the attention of the Court. Listen to this language: "The reviewing authority"—and they had before them these statements.

The COURT: All right.

84 Mr. CARNEY: "Will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time." —Not was insane, not had been adjudicated insane, but that he may have been insane.

The COURT: Well, they did the same thing in reviewing these statements, because they are not based on any solid statements of fact.

Mr. CARNEY: Don't make up your mind yet. Wait a minute until I get through. "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense or at the time of his trial, or regardless of whether the question was raised at the trial below or how it was determined if raised."—Now, what else on earth could bring it to the attention of a court or a reviewing authority more than was done. His own lawyer, Captain Matisin, says, "I began to get a suspicion at the trial that the man wasn't right. I couldn't get anything out of him during the trial. He wasn't responsive to me; couldn't find out then. Then I took him to Dr. Pelettieri and Dr. Pellettieri examined him and made a statement that in his opinion he wasn't right." Captain Graham made a statement he wasn't right. Goolsby made a statement. All that went into this record. But here is the crowning thing about it. When they presented that to the members

85 of that court, five members of that court said that he ought to have this examination provided for in this law. It would be a shame on the jurisprudence of the whole country, Your Honor, to allow a boy whose own court, before whom he was tried, the members of that court said that they thought he ought to have a neuropsychiatric examination as provided by this law and in spite of that fact, in spite of these statements and in spite of the recommendation of the members of that very court, five of them out of six, the reviewing officer arbitrarily passed it aside and didn't order it done in violation of this law here which said that he shall have it. The record shows this was before the reviewing authority, and in spite of that and in spite of this law which says if there may have been, where it appears from the record or otherwise, in other words, somebody could have just written him a letter and said, General, this boy wasn't right when he was tried. Under this law in my

opinion it was his duty and he deprived the defendant of a valuable right amounting to the want of due process of law when he didn't order it done. Not order him discharged. No. Just order him to go before a board and see whether or not. That is what the law says he shall do and they didn't do it. It is a flagrant violation of his rights under the due process clause because they didn't at-
86 tempt to carry out this provision in this law made for his benefit. And the courts say that if a failure to carry out this or a material matter amounts to a failure of due process of law, we will turn them loose. I have got decision after decision here to read.

The COURT: Well, there is no question about that conclusion, but the point about it is that the record doesn't justify any such action, and these opinions are just the flimsiest things I ever heard, because they don't have any solid basis in fact and the fact is that he was given an examination to determine his responsibility for trial before trial. All right.

Col. VOORHIS: That in my opinion, Your Honor, is the nub of it. All that the defense counsel asked for was a neuropsychiatric examination.

The COURT: That had already been done.

Col. VOORHIS: He had had that within ten days or two weeks before trial by a competent duly assigned neuropsychiatrist.

The COURT: The controlling thing about that.

Mr. CARNEY: Just a minute. Let me answer that. I overlooked it. I want to tell you about that. You take the examination of Captain Segel himself, and it is enough to put that court and the reviewing authority upon notice that there might have been something wrong with this boy.

The COURT: It isn't. That is not true.

87 Mr. CARNEY: Here is what he says——

The COURT: I heard what he says.

Mr. CARNEY: He said he had the intelligence of an eleven year old boy.

The COURT: Yes.

Mr. CARNEY: They tried an eleven year old boy for rape and condemned him to death and he says it is a borderline case. That is enough in my opinion to come in this law.

RULING OF THE COURT

The COURT: He might not have had a high rating, but they determined his mentality. While he might have had an eleven year old mind, his other equipment was more developed than that, evidently was. He has been accorded every right in my opinion he is entitled to, and in my opinion he was given a fair trial, and he

remembers everything that happened before and after except during this critical period and I don't think there is any ground for any claim of denial of rights and I am going to deny the writ, and return him to the custody of the Marshal, and You will have your exception to that action.

Mr. CARNEY: Will Your Honor give me the right to appeal? I give notice of appeal.

The COURT: Certainly.

Mr. CARNEY: Will you allow me to appeal as I came in to this court, in forma pauperis?

The COURT: If there is no objection on the part of the Government or if they have no information to the contrary.

(End of hearing)

88 Reporter's Certificate to foregoing transcript omitted in printing.

88a **Excerpts From Respondent's Exhibit No. 1**

REPORT OF INVESTIGATION OF CHARGES
MARCH 24, 1945

* * * 8. I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal. * * *

88b HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Surgeon

APO 89 US Army
25 March 1945

SUBJECT: Psychiatric examination of Pvt Marton L. Whelchel, ASN 18038433, Co C, 602nd TD Bn. Age 22 years. Four years in the Army.

TO: Assistant Chief of Staff, G-1, 89th Infantry Division APO 89 US Army.

Present Complaint:

This soldier's version of his present difficulty is as follows: On the evening of 14 Mar 45 he was in the securities section and borrowed a thousand francs from a friend. With it he played poker until 2200 and then returned to his section. They were having a drinking party during the course of which he drank two-thirds of a bottle of white wine. The party broke up about midnight. "We

all went to bed and fell to sleep and I didn't get up until the next morning. The next morning both girls picked me out but I never had anything to do with them. I believe I had seen her in town before and that is how she may have known me."

Family History:

Father died at the age of 35 from some unknown cause when soldier was four years old. Mother is 68 years old and has been married three times, her previous husband having died each time. She is considered a rather nervous woman and is a- enthusiastic follower of the Holy Roller Church. He has three full sisters who are alive and well and four half-sisters who are also alive and well. There is one full brother who is in the Army somewhere in the ETO. Another brother was killed in the Pacific theatre and he has a half-brother at home who is a cripple. There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily.

Personal History:

Medical History: He had the usual childhood diseases and tho he denies any history of venereal disease, he was treated for a "strain" (urethral discharge), in 1944.

Social History: As a child he had no fits, convulsions, temper tantrums, of sleep walking and he doesn't recall being enuretic. He comes from the state of Texas and says he always enjoyed company and made friends easily. However, the only sport he ever indulged in was playing cards. He reached the sixth grade in school and quit at the age of twelve years after repeating a number of grades. He always found school rather difficult. He had been drinking rather heavily as far back as he can remember and even states that his father started them off drinking beer as infants because he felt "it was healthy."

88c The soldier was married in 1941 at the age of 19 to a girl of 18. There were no children by the marriage. While he was at camp, his wife "just got to going with a sailor and wanted a divorce." This was granted on the grounds of cruelty. He was a chronic nail-biter and always mildly nervous. He started driving a truck for his brother-in-law at the age of 13 and kept this job until entering the Army.

Army Record:

In 1943 he was arrested for drinking, in the course of which he "whips some MP's and shut them in a back room of a tavern". For this he received 30 days of hard labor and was reduced from Pfc. to Private. The highest grade he ever held was a T/4 as a tank

driver for one and one-half years. Early this month he just got tired of it and asked to be reduced to his present rank of private. He denies the use of any drugs and is not a member of any church.

Mental Examination:

Attitude and General Behavior: Although this soldier was superficially cooperative, one got the definite impression that much material was definitely being withheld. He revealed a low level of intelligence and his story was such that might have been concocted by an individual having a minimum of native shrewdness.

Stream of mental activity: His speech was guarded at times and the coherent and relevant, lacked conviction.

Emotional reactions: He was tense and guarded throughout the interview. He fidgeted all the time. There was no discrepancy, however, between emotional expression and thought content.

Content of thought; mental trends: There was no evidence of dillusions, hallucinations, grandosity, or hypochondriacal trends. He was asked, in view of his own inadequate explanation, whether he thought someone was trying to frame him. He jumped at the opportunity to answer this question and said "Maybe the Germans were trying to get even with us for having been put out of their homes."

Orientation, mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Belleveau intelligence test he scored a mental age of 11 years and 5 months and an IQ of 71.

Insight and judgment: He constantly refused to alter his story in regard to his activities and felt as tho nothing could be proved against him. He admitted that the act of rape was a serious crime and deserved severe punishment.

Summary and Conclusions: Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psycopathic traits.

NATHAN P. SEGEL,
Captain, MC,
Div Neuropsychiatrist.

88d DIVISION STAFF JUDGE ADVOCATE'S REVIEW OF THE CHARGES

Headquarters 89th Infantry Division
Office of the Staff Judge Advocate

APO 89, U.S. Arm,
27 March 1945

Subject: Joint Charges Against T/5 Elmer L. Spohn * * * and Pvt. Marton L. Whechel * * *
To: Commanding General, 89th Infantry Division, APO 89, U.S. Army

* * *

7. * * * It is recommended that:

* * *

d. That Captain Segel be directed to transmit his reports to the commanding officer of the unit concerned through the investigating officer. * * *

FRANK M. GLEASON,
FRANK M. GLEASON,
Major, J.A.G.D.,
Staff Judge Advocate.

Headquarters 89th Infantry Division
Office of the Staff Judge Advocate
APO 89, U.S. Army

27 March 1945

Subject: Memorandum report on courts-martial charges.
To: Commanding General, 89th Infantry Division, APO 89, U.S. Army.

Grade, name, serial number, and organization of accused.

Private Marton L. Whelchel, 18038433, Company C, 602nd Tank Destroyer Battalion * * *.

1. * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently. * * *

FRANK M. GLEASON,
FRANK M. GLEASON,
Major, J.A.G.D.,
Staff Judge Advocate.

88e

HEADQUARTERS

EUROPEAN THEATER OF OPERATIONS

UNITED STATES ARMY

UNITED STATES

v.

PRIVATE MARTON L. WHELCHEL, 18038433, Company C, 602d Tank Destroyer Battalion

REVIEW BY STAFF JUDGE ADVOCATE

1. *Trial.* Accused was tried at Immerath, Germany, on 10 April 1945 by a general court-martial appointed by paragraph 1, Special Orders No. 32, Headquarters 89th Infantry Division, United States Army, 26 March 1945.

2. *Charges and Specifications.* The offenses involved were (R 4):

		Pleas (R 5)	Findings (R 30)
Charge I	: Violation of Article of War 92.	NG	G
Specification:	Rape of Fraulein Hildagard Thull, 14 March 1945	NG	G
Charge II	: Violation of Article of War 93.	NG	G
Specification:	Assault upon Fraulein Helga Thull with intent to commit rape, 14 March 1945.	NG	G

3. *Sentence. a.* Accused was found guilty by *unanimous* vote of the members present, and was sentenced by *unanimous* vote of the members present on 10 April 1945 to be hanged by the neck until dead (R 32).

b. The convening authority approved the sentence on 19 April 1945 and forwarded the record of trial for action under Article of War 48 (page following R 32).

4. *Service Data.* Accused is 22 years old; he enlisted on 15 January 1941; there were no previous convictions (R. 31).

5. *Prosecution Evidence.* On 14 March 1945 (R 6, 11, 16) at approximately 2300 hours (R 6, 20), accused and Technician Fifth Grade Elmer L. Spohn, co-accused (R 8), were, in response to persistent knocking on the door, admitted into a house in Immerath, Germany, then occupied by Matthias Thull, his wife, his daughters Hildagard and Helga (R 7), ages 16 (R 11, 19) and 13 (R 11) respectively, his son Ginder (R 7), and his brother-in-law, Joseph Schmitz (R 11). The mother and children occupied two beds in a

room upstairs (R 7), and Matthias Thull (R 6) and Joseph Schmitz slept downstairs (R 11). Upon entering, accused and Spohn indicated they wanted to sleep in the kitchen. When Matthias told them there was no room, they went upstairs. As Matthias Thull started to follow them, accused shoved him, struck him on the chest with his gun and forced him to remain downstairs (R. 6). After the two entered the upstairs room, they sat on the bed occupied by the girls, gave each a bar of chocolate and indicated they wanted to sleep on the floor (R. 16). Hildagard was frightened and cried. The two girls dressed and tried to get out of the room (R 16) but accused (R 11, 16, 21, 22), who stood in front of the door, pointed a gun at them and did not permit them to leave (R 16, 21). In response to a call from his wife, Matthias came upstairs (R 7, 16, 21). Accused and Spohn indicated they wanted to have the girls and repeatedly used the word "fuck," a term the Thull family did not understand (R 7, 21). Since Joseph Schmitz could speak a little English, Mrs. Thull called him upstairs (R 7, 11, 16). Accused announced that he and Spohn wanted to "fuck" the two girls (R 11) and demanded that Schmitz tell the girls what they wanted. When Schmitz protested the girls were too young, accused (R 12), covering him with his carbine (R 7, 12, 21) and representing himself as an "SS American soldier" (R 15), threatened to shoot the
88f entire family if he did not do as ordered and "if it didn't happen in two minutes" (R 12). Joseph Schmitz then told Hildagard she had to sit on accused's lap (R 17). Hildagard replied that "she didn't want to; that she was afraid" (R 13). While this was happening, Spohn sat on the bed, vomited (R 8, 16), and went to sleep (R 16). Accused forced everyone in the room except Spohn and the girls to get into one bed (R 8, 13) and took Hildagard over to the other bed. Matthias Thull tried to get up and go over (R 13) but accused pushed him and directed him to remain where he was (R 13, 21). Hildagard sat on accused's knee (R 8, 17). When accused started play around with her pants, Hildagard hollered "mother" and tried to get away but accused would not let her (R 8). Finally, accused hit her over the head with his gun, put her arm around him, removed her pants, and shoved her onto the bed. She tried to get away but accused pulled her back (R 17), and, in spite of her resistance, had intercourse with her (R 18). After spending approximately one hour with her (R 18, 21) [Matthias Thull estimated accused was with her "at least fifteen minutes or longer" (R 9)], accused called Spohn (R 14, 18) and asked him whether he wanted to "fuck" Hildagard, to which Spohn replied in the affirmative (R 14). Accused made some unsuccessful advances at Mrs. Thull (R 9, 19, 21) and then stated he wanted Helga (R 14), to whom he referred as the "kiina booby" or little baby (R 10). Joseph Schmitz protested that Helga was a mere child but accused pulled

her to him (R 14), and, while she was crying and shouting "Mother, mother, I'll die" (R 14, 19), accused removed her pants (R 10), made her take hold of his penis (R 10, 22), lay on top of her (R 19, 21) and "used" her (R 10, 21). After a short while (R 19), accused and Spohn got up (R 10), took their guns (R 22) and their bottles (R 14) and left, locking the door from the outside (R 10). In the opinion of Matthias Thull, accused had apparently been drinking but "you couldn't tell whether he was drunk or not" (R 10). In the opinion of Joseph Schmitz, accused was a little drunk but "he hadn't lost his senses" and was able to carry on a conversation (R. 15). In the opinion of Hildagard, accused "certainly knew what he was doing" (R 20), and in the opinion of Helga, accused was drunk (R 22). The battalion surgeon examined Hildagard and Helga the following day and found the entrance to Hildagard's private parts swollen and purplish. There was a tear of the hymen and a small blood clot at the lower end of the tear. He found nothing on Helga (R 23). On cross-examination he stated that the swelling and discolorations on Hildagard could have been caused by self-abuse, foreign abuse or "from a number of things" (R. 23-24). Lieutenant Robert E. Graham, who testified that accused was in the military service, on cross-examination stated that accused "was one of the best tank destroyer drivers in the ETO" (R 24).

6. *Defense Evidence. a.* On 14 March accused played cards with four other soldiers until between 2300 and 2400 hours (R. 25). Between these hours the group moved to another place and accused, who had lost his money and was too drunk to play, did not accompany them (R 26).

b. Accused was advised of his rights as a witness and elected to remain silent (R 27).

c. Spohn testified under oath in his own behalf, during which he stated that on the evening of 14 March he and accused were drinking wine "or whatever it was." At some hour and by some means that he could not recall, he and accused entered a house, went upstairs and there heard Germans talking. He went to sleep because he was not feeling well. He was later awakened by accused who asked him whether he wanted to "fuck with this girl." While Spohn was trying to have intercourse, accused and "this other girl got on the bed." After a short time accused suggested they leave, which they did (R 27). During the brief period he was awake, after first entering the room, the occupants of the house did not argue with him and accused (R 28).

7. *Discussion. a. Specification of Charge I (Rape of Hildagard):* The essential elements of this offense are: (a) That accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done with force and without her consent (MCM, 1928, par

148*b*). Although some hearsay testimony was admitted in this case, the net effect of the competent prosecution and defense evidence warrants the conclusion that accused had carnal knowledge of Hildagard against her will. The major portion of the testimony is that of enemy nationals and, as such, must be accepted with caution. However, this evidence was substantially corroborated by the undisputed evidence from friendly sources. Spohn, the co-accused, established the presence of accused at the place where the alleged offense
88g occurred and confirmed the testimony of the members of the Thull family that accused invited co-accused to have intercourse with Hildagard. The casual manner in which accused suggested that Spohn have relations with Hildagard justifies the inference that he himself had finished with her and that she was then available to Spohn. Hildagard's testimony that the penetration was effected is confirmed by the testimony of the medical officer that the entrance to Hildagard's private parts was swollen and discolored, and that there was a small blood clot at the lower end of the tear of the hymen. The absence of consent, likewise, does not rest solely on the testimony of the members of the Thull family. It was established that accused and Spohn entered the Thull dwelling at night as uninvited intruders. Spohn testified that Mr. and Mrs. Thull and the two girls were in the room where the alleged rape took place (R 28). Human experience favors the assumption that a girl of 16 would not, in the presence of her parents, consent to the act of sexual relations. This circumstantial evidence renders the prosecution testimony not merely plausible but compelling that accused overpowered Hildagard either by force or fear, or both. The evidence is that accused was under the influence of liquor at the time of the offense. "Intoxication, while no excuse for crime, can be set up as a defense in a prosecution for rape, where the degree of intoxication was such as to render the accused incapable of forming an intention to ravish the prosecutrix * * *" (1 Wharton's *Criminal Law*, 12th Ed, Sec. 753). The evidence is clear that accused, though under the influence of liquor, was conscious of what he was doing. The finding of guilty is, therefore, sustained by the evidence.

b. Specification of Charge II (Assault upon Helga with intent to commit rape): This offense "is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished * * * The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and consur with the assault" (MCM, 1928, par 194*b*). Every essential element of this offense was established beyond a reasonable doubt. Although Helga's testimony that accused "used her" (R 21) is discredited by the negative findings of the medical officer, there is no doubt that accused lay on the bed with her. This fact is definitely confirmed by the testimony of the co-accused. What was said about

the element of consent with respect to Hildagard is equally applicable to this offense. It is inconceivable that, under the circumstances, accused had the 13-year-old child's consen to lie on the bed with her. That is the most aggravated element of the assault from which the intent to commit rape may be inferred. The other facts alleged in the specification, that accused removed Helga's step-ins and forced her on the bed, is established by Helga's own testimony and is supported by Hildagard's testimony. The evidence is conflicting on the issue of the extent of accused's intoxication. An analysis of all the testimony in the case, however, supports the court's apparent conclusion that accused was not so intoxicated as to prevent him from forming the specific intention to commit rape. The finding of guilty of this offense is, therefore, sustained by the evidence.

c. The following irregularities not affecting the substantial rights of accused, and not mentioned in the original review, are noted. Accused and Spohn were charged jointly in the perpetration of a felony, the rape of Hildagard (Specification of Charge I), and accused was charged separately for the assault with intent to commit rape upon Helga (Specification of Charge II). The record does not disclose that the several accused affirmatively consented to such trial. Under similar circumstances it has been held that even had the defense interposed a motion for severance of the trial, the court would have been authorized to deny the motion. The consent of each accused to be tried together was, therefore, not necessary (CM ETO 3740, *Sanders et al*). However, this was a common as well as a joint trial, and accused was entitled to a peremptory challenge independent of any that might have been extended to Spohn, the co-accused (Dig Ops JAG, 1912-40, Sec. 395(33)). Since the defense stated "The defense has no challenges, either for cause or peremptorily," and since the record recites "The accused were then asked if they objected to any other member present, to which they replied in the negative" (R 3), no prejudicial error has resulted from the failure to tender formally to each accused the right to exercise one peremptory challenge. After Matthias Thull admitted that he understood no English (R 6), he was permitted to testify as to the conversation in English that took place between accused and Joseph Schmitz (R 7), that accused told Hildagard she had to sit on his lap (R 8) and that accused threatened to shoot them (R 9). Hildagard, who also understood no English (R 7), was permitted to testify that accused told her uncle that she had to sit on accused's lap (R 16), and that accused threatened to "shoot us all" (R 17). 88h. This evidence is clearly hearsay, to be distinguished from the directions given in German by Schmitz as the mouthpiece of accused who had asked Schmitz to inform the girls of what he was saying (R 12). However, since the testimony on lack of consent is established by competent testimony corroborated by ample cir-

cumstantial evidence, these errors are not deemed to prejudice the substantial rights of accused. The record fails to mention that the witnesses withdrew from the courtroom after being excused. A copy of this review will be furnished the staff judge advocate of the convening authority.

8. *Opinion of Staff Judge Advocate.* The record of trial is legally sufficient to support the findings and sentence and discloses no error injuriously affecting any substantial rights of accused.

9. *Clemency.* There is no recommendation for clemency in this case. Accused is 22 years old and, during his service, was divorced by his wife. He completed the sixth grade, had no arrests in civilian life, and during more than four years of military service was tried once by a summary court. The investigating officer appraises his record as a soldier as "very good." The division neuropsychiatrist reports that accused is legally sane though he is a borderline mental defective with psychopathic traits. The evidence is that accused was under the influence of liquor while he committed the offense, although his intoxication was not such as to render him unaware of the nature of his conduct. However, it may be considered in determining the measure of punishment to be awarded (MCM, 1928, par 126*a*). Because of accused's relatively low mentality and because of my conviction that his intoxication contributed in a large measure to the offense, I recommend commutation of the sentence.

10. *Recommendation of Staff Judge Advocate.* I recommend that the sentence be confirmed and commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and submit herewith an appropriated form of action. Upon such confirmation it is requisite that the order directing the execution of the sentence be withheld and the record of trial forwarded for action by the Board of Review and Assistant Judge Advocate General, Branch Office with the European Theater of Operations, pursuant to Article of War 50½.

ABRAHAM S. HYMAN,
Captain, JAGD,
Assistant Staff Judge Advocate.

Having read the record of trial, I concur.
ED. C. BETTS,
Brigadier General, U.S.A.
Staff Judge Advocate.

June 1945.

88i HEADQUARTERS 89TH INFANTRY DIVISION

APO 89, US Army
27 April 1945

Subject: General Prisoner Marton L. Whelchel, 18038433, 602d Tank Destroyer Battalion.
To: Commanding General, ETOUSA, APO 887, US Army.

1. General Prisoner Whelchel was jointly tried with General Prisoner Elmer L. Spohn by general court-martial 10 April 1945 for the offense of rape in violation of Article of War 92. The court found him guilty and imposed a sentence of death by hanging. Spohn was sentenced to imprisonment for life. Both sentences were approved and the record of trial forwarded to your Headquarters for action under Articles of War 48 and 50½.

2. The attached request from Defense Counsel, together with concurrence of the court members therein, with the statements of Captain N. W. Pellettieri, First Lieutenant Robert E. Graham, and Sergeant Harry P. Goolsby, forwarded herewith, indicate that there is some question of this man's sanity. He was however, examined by the Division Neuropsychiatrist before case was referred for trial and found legally sane.

For the Commanding General:

V. J. BLONDELL,
Lt. Col., A. G. D.,
Adjutant General.

4 Incls:
#1—3 n/c.
#4 added—Ltr of Defense Counsel.

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89 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

Civil No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. MCDONALD, WARDEN, RESPONDENT

ORDER OF DISMISSAL

Filed Feb. 21, 1949

On this, the 18th day of February, 1949, came on for hearing, at Tyler, Texas, the Order of this Court, directing the Respondent, A. McDonald, Warden, Federal Correctional Institution, Texarkana,

Texas, to appear and show cause why the Petition of the said Marton L. Whelchel for a Writ of Habeas Corpus should not issue.

The said Warden made answer to the Order to show cause, and, among other allegations, answered that he held the Petitioner, Marton L. Whelchel, in custody in the Federal Correctional Institution, Texarkana, Texas, by virtue and under authority of General Court Martial Order No. 388, Headquarters United States Forces European Theatre, dated September 6, 1945. The Respondent Warden further made answer to the allegations in the Petition for a Writ of Habeas Corpus.

The Petitioner, Marton L. Whelchel, was brought before the Court by Respondent, and appeared in person and by an attorney of his own choosing. The said Warden appeared in person and by the United States Attorney and Lieutenant Colonel Nicholas R. Voorhis, the latter appearing as counsel to the United States Attorney by permission of the Court. The Petitioner and Respondent each announced ready for the hearing. Evidence was introduced by the respective parties.

90 Upon consideration of the pleadings and evidence introduced by the respective parties, the Court finds that the General Court Martial, by which Petitioner was tried and sentenced, was appointed, composed, and organized in accordance with the laws of the United States and had jurisdiction to hear the charges against Petitioner; that the proceedings of said Court Martial were in all things in accordance with the laws of the United States, and that every right guaranteed to the Petitioner was fully protected as required by law.

The Court concludes that the Petition for a Writ of Habeas Corpus is without merit, and that the custody of the Petitioner, Marton L. Whelchel, by the Respondent, A. McDonald, is in all things in accordance with law.

It is, therefore, Ordered that the Petition of the said Marton L. Whelchel, for a Writ of Habeas Corpus be, and the same is hereby dismissed, and the Petitioner, Marton L. Whelchel, is hereby remanded to the custody of the Respondent, A. McDonald, Warden

(S.) RANDOLPH BRYANT,
United States District Judge
Eastern District of Texas.

91–95 In the United States District Court

[Title omitted]

NOTICE OF APPEAL

Filed Feb. 28, 1949

To the Honorable Judge of Said Court:

Now comes the petitioner in the above case and after judgment of the court remanding him to the custody of respondent herein, gives notice of appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit, New Orleans, Louisiana.

CARNEY, CARNEY & MAYS,
By (S.) HUGH CARNEY,
Attorneys for Petitioner.
(S.) MARTON L. WHELCHEL,
Petitioner.

Sworn to and subscribed before me by the said Marton L. Whelchel, Petitioner, this the 28th day of February, 1949.

[SEAL.] (S.) LOUIS A. HUBER,
Notary Public, Bowie County, Texas.

96 Clerk's Certificate to foregoing transcript omitted in printing.

97 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WELCHEL

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 8, 1949

On this day this cause was called and after argument by Hugh Carney, Esq., for appellant, and Reginald C. Miller, Lieutenant Colonel, J. A. G. D., for appellee, was submitted to the Court.

98 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WHELCHEL, APPELLANT

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Texas

(July 22, 1949)

Before HUTCHESON, SIBLEY, and WALLER, Circuit Judges

OPINION OF THE COURT—Filed July 22, 1949

SIBLEY, Circuit Judge:

Appellant, Marton L. Whelchel, was tried and convicted for rape on a German girl and sentenced to death by a general court-martial held at Immerath, Germany, on April 10, 1945, he being a private in a Tank Destroyer Battalion on active war duty. The sentence was commuted to life imprisonment by General Dwight
99 D. Eisenhower. Later the President, on July 16, 1947, reduced the term to twenty-one years. On Jan. 10, 1949, discharge was sought by habeas corpus in the District Court for the Eastern District of Texas, but after a hearing the imprisonment was held lawful and Whelchel was remanded to custody.

On this appeal two points only are argued: 1. The court was composed of officers alone, with no provision of law for including any members of the private soldiers' class, contrary to the Fifth and Ninth Amendments of the Constitution. 2. The reviewing authorities failed, on notice of the probable insanity of the accused at the time of the offense and of his trial, to halt the execution of the sentence and have a thorough psychiatric examination made of him pursuant to Section 87(b) of the then Manual for Courts-Martial, and thereby deprived him of due process of law.

The Court-Martial record shows the court to have been organized according to the Articles of War, and to have proceeded regularly, the accused being represented by counsel of whom no complaint was or is made. It was composed wholly of commissioned officers, as provided by Article of War 4, (10 U. S. C. A. Sect. 1475). Such a provision has been in all the Articles of War enacted since the adoption of our Constitution, and was in the British Articles of War of

1765, and in the American Articles of War of 1776. See Winthrop's Military Law and Precedents, Second Edition, pages 931 and ff. So far as we are informed never before has it been urged that there is constitutional infirmity in the provision. In *Kahn vs. Anderson*, 255 U. S. 1, a sentence was imposed in the United
100 States in time of peace, and the Articles of War were attacked as not providing for indictment and jury trial according to constitutional provisions. The court said, page 9: "In connection with this subject we observe that a further contention that, conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury respectively secured by Art. 1, Sec. 8 of the Constitution, and Art. 5 of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained—a situation which was so obvious more than forty years ago as to lead the court to say in *Ex parte Reed*, 100 U. S. 13, 21, 25 L. Ed. 538: 'The constitutionality of the Acts of Congress touching Army and Navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const. Art. 1, Sect. 8; Amendment 5. In *Dynes vs. Hoover*, 20 How. 65, 15 L. Ed. 838, the subject was fully considered and their validity affirmed.'" The application of these constitutional provisions to trial by military commission, in lieu of court-martial, under the Articles of War was elaborately reexamined in *Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 1, with the same result.

The contrary argument is that under Magna Charta one's right to be tried by a jury of his peers was established, and is retained by the Ninth Amendment of the Constitution, and the status of
101 a private is so different from that of an officer as to make them completely different classes of persons; and that the Commanding General appoints the court and designates its members, and the whole set-up is aimed at discipline more than at preserving the rights of the accused. The Congress, impressed perhaps with such arguments, did recently alter Article of War 4, made under the authority of Constitution Art. 1, Sect. 8(14), so as to permit service of enlisted persons on the courts-martial for the trial of such persons. We are of opinion that the Constitution was not violated by the Articles hitherto in force on this subject.

2. It is truly argued that the military law is solicitous about the sanity of the accused, both at the time of the offense and at the time of trial. The Manual for Courts-Martial, in force in 1945, promulgated by the President as a procedural guide under Article of

War 38, 10 U. S. C. A. § 1509, provides in Section 30(c), "No charge will ordinarily be referred for trial if he (the appointing authority) is satisfied that the accused is insane or was insane at the time of the offense charged". Section 35(c) says: "An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or a board convened . . .," when insanity is suspected. Section 63 directs the court to enquire into the mental condition of the accused while the case is before the court, if it appears there is reason therefor in the interest of justice; and Section 75 directs the taking of additional evidence on the point if it appears to be in the interest of justice at any time before the sentence is imposed. Section
102 78(a) declares that one cannot be legally convicted if there is reasonable doubt as to his mental responsibility for the offense. Section 87(b) directs the reviewing authority also to take "appropriate action" if it appears that the accused may have been insane, "regardless of whether any such question was raised at the trial or how it was determined if raised." These provisions are all directory, relating to the exercise of jurisdiction, and do not limit jurisdiction. They resemble the rules of the law applied in civil courts in the trial of crimes. The plea of not guilty covers the question of sanity at the time of the oqense, and proof of insanity at that time may be offered under that plea. Insanity at the time of trial is a special issue ordinarily to be raised and settled before the trial begins. In the civil courts it has been held that the trial concludes both questions, and that insanity either at the time of the offense or at the time of the trial does not destroy jurisdiction, and cannot be asserted in a collateral attack by habeas corpus. *Whitney vs Zerbst*, 62 Fed. (2) 970; *Hall vs. Johnston*, 86 Fed. (2) 829; *Strigley vs. Sanford*, 148 Fed. (2) 264.* In view of the more limited interference by habeas corpus with the military courts, (See *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *Sanford vs. Robbins*, 115 Fed. (2) 435), we think the same rule should be applied here. It is no more appropriate for a habeas corpus court to try the sanity of an accused convicted by a court-martial than to try his guilt. Both questions are the responsibility of the court-martial and the reviewing authorities, including the President.

103 In this case there was a preliminary report to the Division Commander by the Staff Judge Advocate that there was no

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* See also 14 Am. Jur. Criminal Law, Sec. 46; 25 Id., Habeas Corpus, Sec. 84. But there is recent authority that habeas corpus may be available to attack a conviction in a civilian court. See Forthofer vs. Swope, 103 Fed. (2) 707; Ashley vs. Pecor, 147 Fed. (2) 318; Brewer vs. Hunter, 163 Fed. (2) 341; Moss vs. Hunter, 167 Fed. (2) 683.

reason to believe the accused mentally defective or deranged, either temporarily or permanently. The Division neuropsychiatrist had examined the accused and reported him legally sane, though of a low mental order. No issue of mental derangement was made in the trial. After conviction and sentence the defense counsel brought forward facts and opinion evidence to show derangement which was submitted to the reviewing authorities, along with a recommendation by five members of the court-martial that accused be given a thorough psychiatric examination. The evidence in the trial, especially that by his companion in the criminal enterprise, tended to show that they both were drinking, but there were no circumstances showing mental derangement at the time. Whelchel did not testify, and he claims now to be unable to remember anything about the affair. The reviewing authorities did not order a further psychiatric examination, but commuted the sentence from death to life imprisonment and finally to twenty-one years. The district court on habeas corpus properly refused to interfere.

3. Habeas corpus to review the action of another court is in its nature extraordinary, and will not be used, if available at all, till other remedies have been exhausted. *Goto vs. Lane*, 265 U. S. 393, 401. See also *Ex parte Hawk*, 321 U. S. 114. On Feb. 1, 1949, the amended Articles of War (Act of June 24, 1948, 62 Stats. (627) went into effect. Article 53 provides for the grant of a new trial or the vacation of a sentence for good cause shown within one year after final disposition of a court-martial case; and in cases involving
104 offenses committed during World War II, the application may be made within one year after termination of the war. The action taken on such application is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the district court on habeas corpus. That it has not been sought here is within itself a sufficient reason for noninterference.

Judgment affirmed.

195 In United States Court of Appeals, Fifth Circuit

No. 12760

MARTON L. WELCHEL

versus

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION OF TEXARKANA, TEXAS

JUDGMENT

July 22, 1949

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

106 In the United States Court of Appeals

[Title omitted]

PETITION FOR REHEARING—Filed August 12, 1949

To Said Honorable Court:

Now comes the appellant in the above entitled and numbered cause and moves the court to set aside the judgment of this court, rendered on the 22nd day of July, 1949, affirming the trial court's judgment, and to grant him a rehearing, reverse the judgment of the District Court and order appellant released from custody, upon the following grounds, to-wit:

1. The Court erred in overruling appellant's Point One, wherein appellant set up the unconstitutionality of the court-martial,
107 in that, the law providing for the same was contrary to the Fifth and Ninth Amendments of the Constitution of the United States.

2. The Court erred in refusing to sustain appellant's Point Two, wherein appellant says that he was denied due process of law; in that the reviewing authorities in his court-martial proceeding arbitrarily and willfully refused to order a psychiatric examination of the appellant under Section 87b of the Manual for Courts-Martial, there being abundant evidence presented to the reviewing au-

thorities that the appellant was insane, both, at the time of the commission of the offense and at the time of trial.

3. The Court erred in holding that the remedy of writ of habeas corpus was not available to appellant because the defense of insanity should have been made in the trial by court-martial in view of the fact that appellant was incapable of presenting any defense by reason of his insanity and his counsel did not know about his insanity at the time of the trial, but when he did find it out about two weeks after the trial, he immediately presented evidence to the membership of the court that tried him and procured a recommendation from five members of the six man court, recommending a psychiatric examination for appellant.

4. The Court erred in holding that, because of the amended
108 Articles of War (Act of June 24, 1948, 62 Stats. 627), which went into effect February 1, 1949, appellant was precluded from raising the questions presented by habeas corpus; but the record shows that, (a) the appellant had already instituted the proceedings before the article took effect; and (b) more than a year has passed since the court-martial sentence and since the termination of the war. The statute is, thereby, ineffective to grant full relief to the appellant because there is no way that the Judge Advocate General's Department could now hold the psychiatric examination of appellant, which should have been ordered by the reviewing authorities at the time under Section 87b.

5. The Court erred in its holding with regard to the amended Articles of War (Act of June 24, 1948, 62 Stats. 627), "that it has not been sought here is within itself a sufficient reason for noninterference."

6. The Court erred in its holding wherein the court, said "Whelchel did not testify, and he 'claims' now to be unable to remember anything about the affair"; whereas, the record shows that Whelchel testified on the habeas corpus hearing before the district court, positively, that he knew nothing about the rape incident, or his trial, and there was no evidence introduced by the government contradicting his testimony at all, but on the
109 contrary, his testimony was supported by the testimony of Dr. Pellettieri, who saw him immediately after the court-martial and made a statement that, in his opinion, Whelchel was suffering from total amnesia of the whole incident. Dr. Pellettieri testified by deposition that in his opinion Whelchel was insane both at the time of the commission of the offense and at the time of the trial and knew nothing about either one. Captain Graham says Whelchel was insane. His sergeant said he was insane. His attorney says he was insane, and five members of the court-martial

said that after the matter was brought to their attention, that he should have a psychiatric examination. Opposed to all this is the mere fact that the psychiatrist who examined Whelchel in the preliminary, required before trial, stated, in his opinion, he was sane, but qualified it by saying it was a border-line case and the appellant had the mind of an 11 year old.

WHEREFORE, appellant prays that the judgment of this court be set aside and he be granted a rehearing and that on rehearing, the judgment of the district court be reversed and the appellant ordered released.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Attorney for Appellant.

110 A copy hereof was mailed to Warren G. Moore, United States Attorney, Tyler, Texas, Lieutenant Colonel Nicholas R. Voorhis and Lieutenant Colonel Reginald C. Miller, Office of the Judge Advocate General, Washington, D. C.

HUGH CARNEY.

111 STATE OF TEXAS,
County of Cass:

I, Hugh Carney, respectfully certify to the court that I am counsel for the appellant in the above styled and numbered cause, and that I, in good faith, have made the motion for rehearing, believing that on the law the court has erred in the particulars therein set forth. I also certify that I have mailed copy of this motion to the counsel for the appellee.

Given under my hand at Atlanta, Texas, this 10th day of August, 1949.

HUGH CARNEY.

112 In United States Court of Appeals

[Title omitted]

AMENDED PETITION FOR REHEARING—Filed December 8, 1949

To the Honorable Court:

Now comes the appellant in the above styled cause and respectfully prays the Court to allow him to file an Amended Motion for Rehearing upon the grounds of newly discovered evidence, bringing the case within the recent decision of this Honorable Court
113 in *Hiatt vs. Brown*, 175 Federal 2d 273, as follows, to-wit:

Appellant reiterates the grounds in his original motion and makes the following as an amendment and as supplemental thereto:

Appellant would respectfully show to the Court that since he filed his original motion herein, he has made application to the Judge Advocate General's Department for rehearing under Article 53 of the Act of June 24, 1948; that appellant's attorney argued the same before the Judge Advocate General's Department, and on November 3, 1949, the Judge Advocate General's Department overruled the said motion for new trial and gave a written opinion as follows:

After stating the case as contained in the record, the Judge Advocate General reviewed the evidence and based his opinion upon the following:

"7. On 4 October 1949 oral argument of Honorable Hugh Carney, attorney for Whelchel, was heard. Judge Carney likewise represented Whelchel in his habeas corpus action.

"Included with the petition for relief under Article of War 53 are copies of the documents referred to in paragraph 3 of this memorandum. At the oral argument counsel requested that I consider in support of Whelchel's application, the evidence received by the United States District Court in the habeas corpus proceedings.

114 "8. In the petition and by oral argument counsel contends that Whelchel was denied due process of law by the reviewing authority, who did not have Whelchel submit to a neuropsychiatric examination subsequent to the date of his trial and sentence. This was one of the issues decided adversely to accused by the Federal courts. It is also contended that the findings and sentence were unjust because of the doubt as to Whelchel's sanity. Counsel suggested at the oral argument that the court-martial was not properly constituted under

Article of War 8 because the law member was not a member of the Judge Advocate General's Department.

"9. Counsel asserts specifically that the following provision of the Manual for Courts-Martial made it mandatory upon the reviewing authority to require another neuropsychiatric examination of Whelchel upon receipt of the documents referred to in paragraph 3 hereof.

"'The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.' (MCM, 1928, par. 87b)

"With this contention I cannot agree, since I am of the view that the foregoing language of the Manual is directory only, thus leaving to the discretion of the reviewing authority the action to be taken thereunder. That the reviewing authority acted on the sentence imposed by the court without first having a further examination of the accused was not, in light of the evidence and the record, an abuse of discretion. The letter of defense counsel suggesting a further examination was written six days after the reviewing authority approved the sentence. At the time of approval the reviewing authority had before him the report of the division neuropsychiatrist and the recommendations of the investigating officer and the staff judge advocate heretofore mentioned."

115 From the opinion, it appears that the Judge Advocate General based his decision upon the legal proposition that the language of Article 87b is directory only; whereas, it is the contention of appellant that the language of Article 87b is mandatory and a refusal to apply therewith amounts to want of due process of law.

We quote from the Judge Advocate General's opinion, as follows:

"Counsel's suggestion that the court-martial which tried accused was not constituted in accordance with the requirements of Article of War 8 presumably was predicated upon the holding of the United States Court of Appeals for the Fifth Circuit in the case of *Hiatt* v. *Brown*, 175 F. 2d 273. I do not regard the decision in the Brown case as presently controlling, particularly in view of the contrary holding by the Court of Appeals for the Second Circuit in the case of *Henry* v. *Hodges*, 171 F. 2d 401."

Appellant would respectfully show to the Court that during the argument before the Judge Advocate General, appellant's counsel called to the attention of the Judge Advocate General that since the decision of this Honorable Court in this case was rendered, the same Court had rendered a decision in *Hiatt vs. Brown*, 175 Federal 2d 273; that counsel made inquiry of the Judge Advocate General at said time whether or not the law member in Whelchel's case was a member of the Judge Advocate General's Department and received the reply that the law member was not a member of the Judge Advocate General's Department. As the
116 Judge Advocate General, in his decision, does not set up the fact that, while the law member was not a member of the Judge Advocate General's Department; that there was no member of such department available to act as law member, appellant respectfully represents that there was none, and this case now falls squarely within the provisions of *Hiatt vs. Brown*, 175 Federal 2d 273, and ought to be reversed on those grounds.

WHEREFORE, appellant prays the Court to be allowed to file this amended motion for new trial, and prays the Court that appellant be allowed to present a written brief and oral argument in support thereof; that on final hearing the said motion be granted and the former judgment of this Court be set aside and the judgment of the lower court be reversed and remanded, with directions to declare the judgment of the Court-Martial null and void and to release the appellant from confinement; for such other and further orders in law or in equity to which, in the opinion of the Court, appellant may be entitled.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Attorney for Appellant.

117 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WHEECHEL, APPELLANT

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Texas

Before HUTCHESON, WALLER, and SIBLEY, Circuit Judges

OPINION DENYING PETITION FOR REHEARING AND MOTION FOR STAY OF JUDGMENT—Filed December 28, 1949

BY THE COURT:

The motion for rehearing and for stay of judgment is hereby denied. We have delayed entering this order in order that appellant might have opportunity to apply to the Judge Advo-
118 cate General under Article of War 53, as amended, 10 U. S. C. A. Sec. 1525, for a new trial. Appellant by an attempt to amend his motion in this court informs us that application has been made to the Judge Advocate General for relief, and has been denied; and he now seeks to add a new ground of attack upon the judgment of conviction which was not presented in the District Court. This we think cannot be done. Moreover the last words of the amended Article of War 53, seem to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States. The motion to amend is also denied.

119 In the United States Court of Appeals

[Title omitted]

ORDER DENYING REHEARING AND MOTION FOR STAY OF JUDGMENT

December 28, 1949

It is ordered by the Court that the petition for rehearing and for stay of judgment filed in this cause be, and the same is hereby, denied.

120 Clerk's Certificate to foregoing transcript omitted in printing.

121 Supreme Court of the United States, October Term, 1949

No. 429, Misc.

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI, ETC.—June 5, 1950.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 866 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CROPLEY
CLERK

No. 109 ~~429 MISC.~~

IN THE

Supreme Court of the United States

JANUARY TERM, 1950

MARTON L. WHELCHEL, *Petitioner,*

v.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

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MARTON L. WHELCHEL, *Petitioner*,

v.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Marton L. Whelchel, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause, and in support thereof respectfully submits this his petition to which is appended his supporting brief:

PETITION

Summary Statement of the Matter Involved.

Petitioner Marton L. Whelchel was a soldier in the United States Army in a Tank Destroyer Battalion on active war duty under General Patton in the advance across Germany. Before a general court-martial held at Immerath, Germany, on April 10, 1945, petitioner was convicted of rape on a German girl and sentenced to death. It was alleged that the act occurred on March 14, 1945. Petitioner was given the usual and customary examination by a psychiatrist, Captain Segal, before trial, and by the psychiatrist, Captain Segal, was found sane, although the psychiatrist stated that it was a borderline case, and that he also based his conclusion upon the fact that there was no history of hereditary insanity. There was, and was shown on the trial of the case in the District Court, that there was a history of insanity, both in the petitioner's father and grandfather, but this was unknown to Captain Segal.

Petitioner was convicted by the court-martial and given the death penalty. Later the sentence was commuted to life imprisonment by General Eisenhower. Still later, on July 16, 1947, the sentence was reduced to 21 years. On January 10, 1949, petitioner filed his application for discharge under habeas corpus in the District Court of the Eastern District of Texas. After hearing was had,

petitioner was remanded to the custody of the Warden at Texarkana. Petitioner appealed this decision to the Circuit Court of Appeals for the Fifth Circuit. On July 22, 1949, the Court affirmed the judgment of the District Court. On December 28, 1949, the Circuit Court overruled petitioner's motion for rehearing. On February 23, 1950, petitioner forwarded to the Clerk of this Court application to proceed in forma pauperis, and was advised by the Court to submit this petition for Writ of Certiorari along with the application to proceed in forma pauperis, which accordingly is here done.

At the trial before the court-martial, the petitioner was represented by Captain Matisin, who doesn't appear to have been a lawyer. No issue of insanity was made in the trial before the court-martial, but about two weeks after the judgment, Captain Matisin talked to Captain Nino M. Pellettieri, who was surgeon, Medical Corps, 602 Tank Battalion, and who had had frequent contact with Private Whelchel, and was advised by Captain Pellettieri that petitioner might have been irresponsible for his actions. Captain Matisin also made a statement (CMR p. 134)* that from his observation of the conduct of petitioner during his trial that he might have been irresponsible; whereupon, Captain Matisin wrote a petition asking that the case be reopened and that Private

*NOTE.—CMR refers to the court-martial record and HCR refers to the habeas corpus record where used herein.

Whelchel be admitted to a hospital for a thorough neuropsychiatric examination. Captain Matisin attached to his petition a statement of Dr. Pellettieri (CMR 131), a statement of the petitioner's commanding officer, Lieutenant Robert E. Graham (CMR p. 132); also, a statement of Sergeant Harry P. Goolsby (CMR p. 133). In all of these statements it was set out that it appeared that Private Whelchel had had a "crack-up" about February 21, 1945, and that in the opinion of all of them, petitioner was suffering from amnesia at the time of the alleged rape. This petition was presented to the court-martial, and five out of six members of the court-martial concurred that petitioner be given a new neuropsychiatric examination (CMR p. 135). In spite of the recommendation by five members of the court-martial, the reviewing authorities ignored the request and affirmed the sentence.

On trial of the habeas corpus action in the District Court, petitioner presented the deposition of Dr. Pellettieri, now practicing in Chicago, Illinois. Dr. Pellettieri testified that in his opinion, formed from personal examination and also from investigation and statements of persons on the ground, the petitioner was insane both at the time of the occurrence of the rape and at the time of the trial. Dr. Pellettieri was not a specialist as a psychiatrist, but during his practice had had some occasion to engage in the practice of psychiatry. Captain Graham

testified in person that he was Lieutenant and in command of petitioner, and that up to about a month before the alleged occurrence and rape, petitioner had been a model soldier and was in charge of one of the tank destroyers, but they had been in combat in the vanguard of Patton's army for about three months continuously; that about two weeks before the date of the alleged rape, petitioner seemed to "crack up," and related an incident of misbehavior on the part of petitioner, and of which, three days later, petitioner had no recollection whatever. It was Captain Graham's opinion that petitioner was insane both at the time of the alleged occurrence and at the time of his trial. Captain Mafisin's statement was introduced by petitioner, together with the recommendation of the five members of the court-martial. Sergeant Goolsby's statement was introduced in evidence by petitioner, showing that in his opinion petitioner had cracked up before the occurrence and was irresponsible for his actions. Petitioner also introduced two witnesses who knew his father and grandfather. They testified that both father and grandfather of petitioner had had spells of insanity, and during such spells they would do violent acts and afterwards know nothing about them. Petitioner himself testified that he had no recollection of having committed the rape, and no recollection of his trial, but that the first thing he remembered, he was in prison in France.

Respondent introduced no testimony other than the record of court-martial.

Article 87b, Courts-Martial Code, in effect at the time of the trial, was as follows:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

The trial court held that Article 87b was merely directory, and based his judgment thereon, stating that it was within the discretion of the Commanding General whether or not any further action be taken under Article 87b.

The Circuit Court of Appeals held that the judgment of the trial court concluded the issue of insanity, and that neither the District Court nor the Circuit Court of Appeals could go back of the judgment; that in a habeas corpus proceeding the insanity of the accused could not be gone into, stating that "No issue of mental derangement was made in the trial." (Opinion of the Circuit Court of Appeals, *Whelchel vs. McDonald*, 176 Fed. (2), 312.)

The Circuit Court of Appeals also held, in paragraph three of the opinion, *Whelchel vs. McDonald*, 176 Fed.

(2d) 312, that it may have been the duty of petitioner to have made his application for new trial before the Judge Advocate General in accordance with *Article 53, as amended, 10 U.S.C.A. Sec. 1525;* but this action had begun before that law took effect. However, pending the motion for rehearing in the Circuit Court of Appeals, petitioner did apply to the Judge Advocate General under the terms of said action for rehearing, which was refused by the Judge Advocate General on the 30th day of November, 1949. The Judge Advocate General's Department based their decision on the decision of the Circuit Court in this case, and also held that Article 87b was merely directory.

The Judge Advocate General's Department had theretofore appeared in this case in the trial court and Court of Appeals, filing a brief and arguing the case personally before the Circuit Court; therefore, any judgment rendered by the Judge Advocate General's Department would be a nullity because of already having appeared as counsel for respondent, and being disqualified thereby to hear it.

After the Judge Advocate General's Department had assumed jurisdiction and rendered their opinion, the Circuit Court of Appeals overruled petitioner's application for rehearing, stating that the action of the Judge Advocate General was binding upon the courts of the United States.

Jurisdictional Statement.

The Supreme Court has jurisdiction to review the judgment here in question upon the following grounds:

(a) The Court of Appeals of the Fifth Circuit in this cause has decided an important question of Federal law, which has not been, but should be, settled by the Supreme Court; that is, whether or not an issue of insanity could be raised in a habeas corpus proceeding where there had been no issue of insanity raised in the trial court.

(b) The judgment of the Court of Appeals of the Fifth Circuit in this case on the foregoing point is contrary to, and in conflict with, the judgment of the Ninth Circuit Court in *Forthoffer vs. Swope*, 103 Fed. (2) 707, and the Eighth Circuit Court in *Ashley vs. Pescor*, 147 Fed. (2) 318.

(c) The interpretation placed upon Article 87b by the reviewing authorities was an arbitrary deprivation of the rights of petitioner amounting to a want of due process under the Fifth Amendment of the Constitution of the United States, and in conflict, in principle, with the pronouncement of the Supreme Court in *Johnson vs. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019.

(d) The holding of the Fifth Circuit Court in this case was error and in conflict with a prior ruling of the

same court, *Hiatt vs. Brown*, 175 F. (2) 273, in overruling the petitioner's amended motion for rehearing, wherein petitioner attempted to set up in his amended motion that application had been made to the Judge Advocate General for release under Article of War 53, as amended, 10 U.S.C.A. Section 1525, wherein petitioner, for the first time, had found out that there was no member of the Judge Advocate General's Department a member of the court-martial which tried petitioner originally, though available, and that, therefore, the court-martial was without jurisdiction.

(e) The Court of Appeals was in error in overruling petitioner's motion for rehearing upon the ground that petitioner had applied to the Judge Advocate General for relief under Article of War 53, as amended, 10 U.S.C.A. Section 1525, and which relief had been denied, the Court of Appeals holding that this ruling of the Judge Advocate General was final; in that, the ruling of the Judge Advocate General upon the motion for rehearing was void because the Judge Advocate General had appeared in this cause in the District Court and in the Circuit Court of Appeals, and, therefore, became disqualified to pass upon any application for new trial made by petitioner. Petitioner also claims that this court should hold that Article of War 53, as amended, 10 U.S.C.A. Section 1525, insofar as the same attempts to make the

judgment of the Judge Advocate General, upon such review, final, is void because in conflict with other statutes of the United States and the Constitution, granting the right of habeas corpus.

(f) The Circuit Court of Appeals erred in overruling petitioner's contention that Court-Martial Code, under which he was tried, and the Acts of Congress providing therefor were unconstitutional and void under Article 5 and Article 9 of the Constitution of the United States, in that the said Code and laws provided that an enlisted man must be tried before a court composed solely of officers, upon two grounds:

1. Petitioner, as a citizen of the United States, was entitled to be tried before a court composed at least of one of his peers, under Magna Carta and Article 9 of the Constitution of the United States.

2. The code is unconstitutional because in conflict with Article 5, guaranteeing due process of law to petitioner as a citizen of the United States, and guaranteeing to him a fair trial before a tribunal having no interest in the outcome of the trial, the whole set-up of court-martial being class legislation, excluding enlisted men, and the predominant purpose to enforce discipline to the interest of the officers composing the court-martial, and not to insure that the defendant received a fair and impartial trial under the law.

In our humble opinion, the foregoing specifications of errors are, in the language of Chief Justice Vinson, in his speech before the American Law Institute, within "*The function of the Supreme Court . . . to resolve conflicts of opinion on Federal questions that have arisen among lower courts, pass upon questions of wide import under the Constitution, laws and treaties of the United States.*"

Many cases are pending in Federal courts all over the United States in which the questions raised in this case have been raised, some of the courts holding one way and some another, particularly, on the point of whether or not a person who is tried by a court-martial while insane, the issue not being specifically joined in the trial court-martial, can raise the point in a habeas corpus proceeding; also, the point of whether or not the language of the statute of 87b shall be construed to be mandatory or directory. Again the court will find there are many other cases pending in the United States courts that have raised the question of the unconstitutionality of the statutes governing courts-martial, particularly, the set-up of the court whereby no enlisted man is made a member of the court, especially in view of the fact that Congress had now passed a law remedying that defect. Strange as it may seem, in the more than one hundred years during which this statute has been on the law books, having many times been assumed to have been uncon-sti-

tutional, nobody has ever raised this point against its unconstitutionality that an enlisted man was not allowed representation on the court. The point can be finally settled in this case.

An elaboration of the contentions submitted in the foregoing summary will be argued in petitioner's appended supporting brief.

Therefore, your petitioner prays that his motion to proceed in forma pauperis be granted; that writ of certiorari be issued, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in Cause No. 12,760, on the Docket of said Court, wherein Marton L. Whelchel was Appellant, and A. McDonald, Warden of the Federal Correctional Institution at Texarkana, Texas, was Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and the rules of this Court; that on final hearing, the judgment of the Circuit Court of Appeals and the District Court be reversed; and for such other and further orders necessary and proper in the premises as this Honorable Court shall deem to be meet and proper.

Dated this 27th day of February, A.D. 1950.

MARTON L. WHELCHEL, *Petitioner.*

Hugh Carney

HUGH CARNEY, *Counsel for Petitioner.*

Counsel for Petitioner in the Court of Appeals was:

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REGINALD C. MILLER,
Lieutenant Colonel, JAGC,
Office of the Judge Advocate General,
Washington 25, D. C.

No. .....

IN THE

Supreme Court of the United States

JANUARY TERM, 1950

MARTON L. WHELCHEL, *Petitioner,*

v.

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS,

Respondent.

PETITIONER'S SUPPORTING BRIEF ON PETITION FOR WRIT OF CERTIOARI

I.

Opinion of the Court Below.

The opinion of the Court of Appeals for the Fifth Circuit will be found in *Whelchel vs. McDonald,* 176 Federal (2) 312, 178 Federal (2) 760.

II.

Jurisdictional Statement.

The principal point of petitioner's contention is that at the time of his trial by court-martial, he was insane

and had been insane prior thereto and inclusive of the date of the alleged rape; that soon after the trial, Captain Matisin, who was appointed to defend petitioner, discovered, shortly after the trial, that petitioner was insane, and procured written statements from Dr. Pellettieri, Lieutenant Graham, and Sergeant Goolsby, which, together with his own statement, were presented to five members of the court-martial, who concurred in Captain Matisin's request that proceedings be halted and recommended that petitioner be given a thorough psychiatric examination. In Article 87b of the Code for Courts-Martial, it was provided:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

In this case, the Circuit Court of Appeals held, although this provision of the law was not complied with, that the district court under habeas corpus had no power to set it aside, holding that the provision was merely directory; that the plea of not guilty covered the question of sanity at the time of the defense and should have been raised and settled before the trial began. Other Circuit Courts of Appeal have held to the contrary and we invoke the jurisdiction of this court upon said point upon two grounds, to-wit:

(1) The point is of such wide import under the Constitution and laws of the United States as to require this court to pass upon it.

(2) The conflict between the Courts of Circuit Appeals ought to be resolved by this court.

We further say that the Supreme Court has jurisdiction to review the opinion in this case because the error in the judgment of the district court, holding that Article 87b was merely directory, and the point was not specifically passed on by the Circuit Court of Appeals; but the holding of the District Court was evidently approved, as the judgment was affirmed. This holding is error in that the language of Article 87b could not be more mandatory, and the failure of the reviewing authorities to give it effect and carry out its provisions was an arbitrary refusal to give to the defendant the benefit of the law under which he was tried, and, therefore, amounted to a violation of the due process clause of Article 5 of the Constitution of the United States. The Circuit Court of Appeals erred in refusing to consider newly discovered evidence of the fact that petitioner was tried before a court upon which there was no member of the Judge Advocate General's Department as provided for by the Eighth Article of War, Title 10, U.S.C.A. Section 1479, and was contrary and in conflict with a former holding of this same Fifth Circuit Court of Appeals in *Hiatt vs. Brown*, 175 Federal (2) 273.

III.

Statement of the Case.

A full statement of the facts and proceedings in this case will be found in the foregoing petition for certiorari and is here adopted and made a part of this brief.

IV.

Specification of Errors.

Errors specified are as contained and as set forth in the petition heretofore set forth.

V.

Argument.

In the trial of habeas corpus before the district court, there was abundant evidence to show that at the time of petitioner's trial before court-martial, and at time of the alleged rape, petitioner was insane. In fact, there was no contrary testimony except the Government introduced the report of Captain Segal, based upon an examination of petitioner immediately after the alleged rape and some two weeks before the trial. A close analysis of the report of Captain Segal (CMR pp. 73-74) will disclose that Captain Segal himself, though finally determining the petitioner was legally sane, yet, leaves a doubt in the mind of anyone reading his report that he was absolutely convinced of the sanity of petitioner, because his summary was as follows:

> "Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered sane and his personality is in keeping with that of a borderline mental defective with psychopathic traits." (CMR p. 74)

In addition to that, in his report Captain Segal says, "There is no family history of mental or nervous disease."

He was wrong, as the trial in the district court showed that petitioner's father and grandfather had both been considered insane. This testimony in the trial court of the insanity of the father and grandfather was uncontradicted. Furthermore, Dr. Pellettieri testified by deposition that in his opinion petitioner was insane both at the time of trial and the time of the commission of the rape. (HCR pp. 11-13, 16-20.) Captain Graham testified that he was insane (HCR p. 34); Sergeant Goolsby said by a statement introduced in evidence that petitioner "appeared to crack up mentally." (HCR p. 24, CMR p. 133.) Captain Matisin, who was appointed to defend petitioner, said in his statement, presented to the court, that there were peculiarities about the conduct of petitioner during the trial which caused him to present evidence to the court that would have warranted a thorough neuropsychiatric examination; and, then, to finally clinch the matter, five members of the court-martial that tried

petitioner, upon the evidence presented by Captain Matisin, concurred in the request that petitioner be given a psychiatric examination. (CMR p. 135.)

It is hard to understand why, in the face of this record and in the face of the language of Article 87b, which, in our opinion, is as mandatory as language could make it, that the reviewing authorities should have ignored this recommendation made by the court, and the evidence presented by Captain Matisin, and refused to order the psychiatric examination, which would have been "appropriate action" demanded by said Section 87b.

Section 63 of the code:

> "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense."

This, in our opinion, applies as well to the reviewing authorities as to the court-martial.

The trial court, on the hearing for habeas corpus, disposed of this contention by holding that Article 87b was merely directory. The Circuit Court of Appeals held against petitioner's contention on the ground that the issue was made in the court-martial trial and was one

that was concluded in the court-martial trial, and that it could not be reopened in a habeas corpus proceeding. Both of these contentions are unsound and are directly in conflict with the principles announced by the Supreme Court in *Johnson vs. Zerbst*, 58 S. Ct. Reporter, 302 U.S. 1019. Also see *Burchfield vs. Hiatt*, 86 Federal Supplement p. 18.

How could an insane man make an issue of his own insanity? How could his attorney do so if he did not know about it? His attorney did set it up as soon as he found out about it.

If due process of law means anything, it certainly does mean that the process of trial laid down by the law shall be followed, and that the defendants may have the benefit of the provisions of the law where they are material. Of course, the courts would be justified in saying that some provisions of the law that had not been exactly followed were directory and, thereby, immaterial; but we have not found any case where there was a flagrant refusal to follow the law, as plainly laid down, as was in this case, that the courts have held that the same was not a denial of due process of law. On the contrary, many cases have stated the principles over and over again that there must be an inherent fairness in the administration of justice. *Adamson vs. California*, 67 S. Ct. 1672; *Hicks vs. Hiatt*, 64 F. Supp. 238; *Anthony vs. Hunter*, 71 F.

Supp. 823; *Beets vs. Hunter*, 75 F. Supp. 825; *Hiatt vs. Brown*, 175 F. (2) 273.

Had Captain Matisin been a lawyer, undoubtedly, he would have raised the point of insanity before the court-martial. Had he procured before the court-martial the evidence he did present two weeks after the verdict, there is no doubt but what the court-martial itself would have stopped proceedings and had a thorough psychiatric examination made of prisoner at that time. This is shown by the recommendation of the five members of the court, and that is what should have been done by the reviewing authorities. The fact that the reviewing authorities did not do this cannot be explained in any other way except as an arbitrary refusal to give petitioner the benefit of the law in his favor, thus depriving him of his rights of due process under the Fifth Amendment of the Constitution.

All these facts were shown in the trial on the habeas corpus action before the district court, and, in addition to the facts shown to the reviewing authorities, it was further shown on trial in the district court that there was insanity in the family of petitioner (HCR pp. 46-48). The district court was of the opinion that this testimony was immaterial (HCR p. 45), but we can conceive of no testimony that would have been more material, because it is common knowledge that hereditary influence is the greatest possible proof of insanity, and had Captain Segal

known that both the father and grandfather of this boy had been considered insane and had committed insane acts, there is no doubt that Captain Segal himself would have declared this man was insane because as he says, without this testimony, it was a "border-line case."

We desire to consider the point in the opinion of the Circuit Court of Appeals that, because of the fact that pending a motion for rehearing in the Circuit Court of Appeals, petitioner made his application to the Judge Advocate General for rehearing as provided by Article of War 53, as amended, 10 U.S.C.A. Section 1525, and his application was denied, the Circuit Court holding that by this denial there was a finality beyond which the courts could not go.

This, we say, is error for many reasons. In the first place, it was a futile gesture for the petitioner to appeal to the Judge Advocate General's Department while the same department was at that time appearing in the Circuit Court of Appeals with their brief and written argument, contending that petitioner's action had no basis in law or equity. Certainly the counsel for your opponent cannot be held to be qualified to pass on the merits of your lawsuit, so that the Judge Advocate General should have disqualified himself in passing on this motion, and his failure so to do, being interested on the opposite side of the case, makes his action a nullity.

In the second place, it is our considered opinion that the Act of February, 1949, under Article of War 53, as amended, 10 U.S.C.A. Section 1525, was not intended to close the door forever to one who had been deprived of his constitutional rights. If it was so intended, it was unconstitutional, because Article I, Section 9, of the Constitution specifically gives to the courts the power to review by habeas corpus any person wrongfully imprisoned. This power is greatly elaborated by statute, *Title 28, Sections 451-466;* also, by the decisions of the Supreme Court, *Johnson vs. Zerbst*, supra.

Of late this court has put life into the Constitution and statutes providing for writs of habeas corpus, and as said by Mr. Justice Black in the *Johnson vs. Zerbst* case:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

So that if it was the intent of this article, providing for new trials before the Judge Advocate General, to foreclose the right of a court of justice to look into the case and see whether or not justice had been done to a citizen of the United States, then that law is unconstitutional

and void because in contravention of Article 1, Section 9, of the Constitution.

In the third place, this case comes within those exceptional circumstances where the need afforded by a writ of habeas corpus in appeal as set forth in *Boiceu vs. Johnston*, 306 U.S. 19, and as fully discussed in the recent case of *Sinclair vs. Hiatt*, 86 F. Supp. 828, in the United States District Court for the Northern District of Georgia, E. Marvin Underwood, Judge. This Sinclair case was decided November 1, 1949, and contained a review of the decision of the Circuit Court of Appeals in this case; therefore, we think that, if valid, the statute of February 1, 1949, providing for motion for rehearing before the Judge Advocate General may not in some cases be final. We think that the principle announced in *Price vs. Johnston*, 334 U.S. 266, would apply to this particular case, which was stated by the court as follows:

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."

Finally, we urge the court to pass upon the contention we made in the application for writ of habeas corpus: that the laws providing for court-martial, and the code thereunder, are unconstitutional and void because the law

is in conflict with Article 5 of the Constitution of the United States, guaranteeing due process of law, and Article 9 of the Constitution of the United States, guaranteeing to the citizens of the United States all the rights theretofore enjoyed by citizens, whether enumerated in the Bill of Rights or not. We think under this provision of Article 9 of the Constitution, it was contemplated that never should a citizen be tried by a court from which his peers had been precluded. This right had been enjoyed by English speaking people since Magna Carta. It is true that Article 5 specifically exempts jury trials in time of war, but there is nothing in the exemption of military trials to exclude representation on the court by an enlisted man. So great has been the feeling that this probably was unconstitutional, and certainly wrong, that Congress has now passed a law providing for the inclusion of enlisted men on a court-martial.

Of course, it may be said that we are a little late in coming before this court with the plea that the court-martial laws are unconstitutional, because they have been held to be for more than one hundred years, constitutional. But, we do say that in no case in the one hundred years do we find where the Supreme Court of the United States has specifically held that a court-martial constituted by officers alone, and excluding therefrom enlisted men, would be a constitutional court in the trial of such enlisted men.

The whole set-up of the court-martial—the General appoints the court—officers; the General appoints the prosecuting attorney—an officer; the General appoints the defense counsel—an officer; the General reviews the decision of the court—is such discrimination against an enlisted man as to be a want of due process; it appearing that the whole set-up is more for the interest of the officers to maintain discipline than to secure the rights of those tried. Since the investigation made by Congress a few years ago, and from which emerged a new act providing for representation on the court for enlisted men, the conscience of people and of the lawmakers has been awakened to the gross injustice of the procedure heretofore prohibiting enlisted men from being members of the court. This investigation disclosed gross abuses growing out of the powers granted by the court to the officers only.

In the next place, we say the law is unconstitutional in that the judges composing the court are interested in the outcome. The interest of the judges (officers) is to maintain discipline. In the case of *Dugan vs. State of Ohio*, 48 S. Ct. Reporter 272, U.S. 439, this court held that because of the small pittance of a two-dollar fee to the judge upon conviction, a trial in that court was not due process of law. How much more is the interest of the officers to maintain discipline, even though it cannot be measured in money. It still is an interest that would

preclude the officer court from giving to an enlisted man his rights under the law, but would rather tend to make those courts mere instruments through which discipline might be rigidly maintained.

An interesting discussion of these matters will be found in an article appearing in the *American Bar Association Journal* for January, 1949, by the Honorable George A. Spiegelbery of the New York Bar on pages 29-31. Also, in the case of *Beets vs. Hunter*, 75 F. Supp. 825, the language of Circuit Judge Murrah expresses our feeling that this law could not but create a court, a trial before which was not due process of law:

> "The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it. The Court has no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law. He could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner's offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it can't stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested."

We also quote from Mr. Justice Roberts in *Lisenba vs. California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166, wherein he said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

Also, we quote from *Adamson vs. People of California*, 67 S. Ct. 1672, wherein Mr. Justice Frankfurter says, as follows:

> "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

Judged by these standards, the petitioner in this case has not had accorded to him the due process of law required by Article 5 of the Constitution of the United States.

VI.

Conclusion.

We, therefore, respectfully submit that this case is one calling for the exercise by this court of its supervisory power to grant a writ of certiorari and, upon final hearing, to reverse the decision of the court of appeals and the district court in this case.

Respectfully submitted,

Hugh Carney

HUGH CARNEY,

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTON L. WHELCHEL,

Petitioner,

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH CARNEY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTON L. WHELCHEL,

Petitioner,

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ARGUMENT IN REPLY TO MEMORANDUM SUBMITTED BY THE SOLICITOR GENERAL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The Honorable Solicitor General bases his argument upon the ruling of the Court of Appeals in this case, *i. e.*, that even though the reviewing authorities had notice that the petitioner may have been insane both at the time of the commission of the offense and at the time of trial, yet, it was within the discretion of said authorities to conclude that no further or additional examination of the petitioner was necessary to justice. This was also the basis of the judgment of the trial court on habeas corpus and the basis of the opinion of the Adjutant General rendered pending the final action of the Court of Appeals in this case.

We take issue with all of them on this conclusion of law. If this construction of the law as taken by the Court of Appeals, the Solicitor General and Judge Advocate General is the law, then Article 87b of the Court-Martial Code in effect at the time of the trial of the petitioner is merely a dead letter. Also, this view of the law is contrary to the view of the first court that tried petitioner on the charges—the Court-Martial.

Although we have quoted this article and it has been quoted by the Solicitor General in his brief, we will, for the convenience of the court, again quote it, to-wit:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised."

We think there could be no stronger way of a requirement of the law being expressed than the language of this article. It is not necessary that there be information before the reviewing authorities that the petitioner was insane, not necessary that there be evidence before the reviewing authorities of probative value requiring a finding that the petitioner was insane. The language of the statute says, "where it appears from the record or otherwise that the accused *may* (emphasis ours) have been insane, the reviewing authorities *will* (emphasis ours) take appropriate action." The Court-Martial that tried petitioner, or at least five members of a six member court, thought that the information submitted by counsel for defendant was sufficient, and recommended to the reviewing authorities that Private Whelchel be admitted to a hospital for a thorough neuropsychiatric examination. That would have been the "appropriate action" required by Article 87b.

The Court of Appeals said that the issue of his insanity was settled by the action of the Court-Martial in convicting the defendant; that it was an issue before the court and the judgment of the Court-Martial was conclusive, regardless of Article 87b, or any other law or holding of the courts to the contrary. The statement of Captain Matisin shows that there was no issue of insanity before the Court-Martial. How could an insane man make an issue of his own insanity if his lawyer himself did not know anything about it until after the trial? It would be a travesty upon justice for the courts to say that, even without Article 87b, if a man were tried who was insane at the time of the trial and his insanity was not discovered until afterwards, that there would be no relief for him. The Court of Appeals, in their opinion, says the holding that the judgment of the Court-Martial was conclusive, but the court also cited authorities to the contrary in the note to their decision. We think that the cases in the note are certainly more reasonable and more conducive to justice than those decisions which hold that the judgment of the court cannot be attacked on the grounds of insanity of the defendant at the time of the trial. Especially ought this to be the law when there was no specific issue made and the attorney for the defendant, without contradiction, knew nothing at the time of the trial of the insanity of the defendant. Within ten days from the date of the trial, the attorney discovered the insanity of the defendant and made his application to the Court-Martial for relief, attaching to his application affidavits and statements from Dr. Pellettieri, Lieutenant Graham and Sergeant Goolsby, together with his own statement of the condition of the mind of defendant during the trial. Five members of the Court-Martial signed the notation on the application made by defendant's counsel, recommending that the psychiatric examination asked by defendant's counsel be given. Had the information been discovered by defendant's counsel before

judgment of the Court-Martial, then Article 63 of the Manual for Courts-Martial would have applied, which is as follows:

> "The Court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense."

In spite of all this, the reviewing authorities also declined to give any relief to Article 87b. Their failure to do so was certainly contrary to the due process clause of the Fifth Amendment. This Article 87b gave to petitioner an invaluable right and his denial of that right was certainly a want of due process.

Habeas corpus is the proper remedy in a case of this nature. No court should refuse relief to the petition by habeas corpus, because the conclusions that petitioner has lost his rights by the judgment of the court-martial when there was no issue before the court. Even had there been an issue before the court-martial, and it had been determined by the court that petitioner was sane, yet, under the circumstances in this case, as shown by the application of defense counsel that he discovered these conditions after the judgment, Article 87b would have required the reviewing authorities to hold the psychiatric examination. We call special attention to the language of 87b, in the latter part, whereas it says this appropriate action must be taken, "regardless of whether any such question was raised at the trial, or how it was determined if raised."

The opinion of the Court of Appeals in this case and of the trial court would narrow the remedy for habeas corpus

back to the old conception of a "bare legal right;" whereas, since the opinion of this Honorable Court in *Johnson* v. *Zerbst*, most of the Federal courts have followed that decision and broadened rather than narrowed the relief to be granted by habeas corpus. We quote from the opinion in *Johnson* v. *Zerbst*, 58 Supreme Court Reporter, 1023, as follows:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry [involves] an examination of facts outside of, but not inconsistent with, the record.' Congress has expanded the rights of a petitioner for habeas corpus and the ' * * effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."' "

In his argument, the Solicitor General gives much weight and finality to the neuropsychiatric examination of petitioner by Captain Segal, made sometime before trial. A

close examination of Captain Segal's examination, though, shows that he himself entertained some doubt as to the sanity or insanity of Private Whelchel. Captain Segal says that "here was an individual of *borderline* (emphasis ours) mental intelligence." Captain Segal also bases his conclusions upon another statement in his report in which he was in error; that is, where he says "there is no family history of mental and nervous disease." That was true so far as Captain Segal knew, but in the trial court it was shown that the petitioner's father and grandfather were both insane in the opinion of their neighbors and in the opinion of a doctor. (Transcript of Record pp. 36-38) Had Captain Segal known of this hereditary history of insanity in petitioner, undoubtedly he would have found Whelchel to have been insane, as, without that information, he said it was a borderline case.

Captain Pellettieri, who was a captain in the medical corp of the 602nd Tank Battalion, to which petitioner belonged, testified by deposition on the trial before the court that, in his opinion, Whelchel was not mentally responsible for his actions at the time of the alleged occurrence of the rape or at the time of the Court-Martial (Tr. p. 19). Captain Pellettieri testified that he formed that opinion from his own observation of Marton L. Whelchel at the time of the alleged offense and immediately before and after the same, together with a medical examination that he made of Whelchel at the time. He further testified that, in his opinion, Whelchel was suffering from total amnesia, both at the time of the alleged rape and of the trial, which was caused from battle fatigue (Tr. pp. 19-21).

The Solicitor General attempts to evade the weight of Dr. Pellettieri's testimony by the fact that the medical examination made by Dr. Pellettieri was not a psychiatric examination, and that Dr. Pellettieri was not a specialist

in psychiatry. It is true that Dr. Pellettieri was a surgeon and medical officer only, but it is also true that Dr. Pellettieri had had training in psychiatry and was psychiatrist for the Selective Service Board in Chicago before he went on active duty in the army (Tr. p. 16). In addition to Dr. Pellettieri's testimony that Whelchel was insane, Lieutenant Graham testified that, in his opinion, Whelchel was insane. Sergeant Goolsby gave a statement to the reviewing authorities that, in his opinion, Whelchel had cracked-up; and his attorney, Captain Matisin, thought he was mentally unstable. Two former neighbors of Whelchel's testified that his father and grandfather were insane. All this testimony had a legal background: facts from which the witnesses could and did testify their opinion as to the insanity of Whelchel. As we understand the law, if a witness gives facts, stating his opportunities of knowing and his observation and details and actions and conduct of the person inquired about, the witness, though a lay witness, may testify his own opinion as to the sanity or insanity of the person in question. Petitioner himself testified on habeas corpus that he knew nothing about the occurrence of the rape or about his trial. There was nothing in the record to refute all this testimony that the petitioner was insane, except the bare report of Captain Segal, which we have shown, on its face, that he also seems in doubt about it, and had he known the fact that petitioner's father and grandfather had been afflicted with forms of insanity, doubtless he would also have found that Whelchel was insane.

Petitioner's Lieutenant, Robert Graham, personally testified on the hearing before the District Court, and he said that, in his opinion, Whelchel was not mentally responsible. (Tr. p. 29) Captain Graham based this upon his intimate knowledge of Whelchel, and he recited facts and circumstances and actions of Whelchel upon which he based his

opinion. This testimony ought to be given great weight, because, of all the men, he was the one man who should know, as he had been in command of Whelchel in battle for more than three months and was closely associated with him. The Solicitor General attempts to belittle the testimony of Lieutenant Graham, because it became Lieutenant Graham's duty to file the charges and because Lieutenant Graham did not tell the Court-Martial about it while Whelchel was being tried; but it must be remembered that Lieutenant Graham was a very busy man. He was in command of the spearhead of Patton's army, which had just made the nfarch into Germany. This occurrence was just a few days before the Battle of the Bulge and Lieutenant Graham lead the way to the relief of our hard-pressed armies where the Germans had broken through. Naturally, he did not have much time and attention to give to matters of this kind, and he said he did not realize the full extent of the value of his testimony until after the sentence of death was pronounced against Whelchel. He then was brought to an abrupt consciousness of the seriousness of the situation, and he gave Captain Matisin a statement to be attached to his application for the psychiatric examination; and in that statement he told the court that Private Whelchel was mentally unstable and detailed incidents and acts of Private Whelchel leading him to that belief. So, that made three witnesses: Dr. Pellettieri, Lieutenant Graham and Sergeant Goolsby, men who ought to have known and men whose veracity ought not to be doubted, who testified that this man was insane to the extent that he did not know what he was doing, either at the time of the occurrence of the rape or at the trial. This, backed up with the testimony of two neighbors of petitioner who knew the father and grandfather of petitioner and that there was insanity in the family, was opposed only by the report of Captain Segal,

which, on its face, shows that Captain Segal himself had some doubt, and ought to lead to the inescapable conclusion by any court that here was a man who was accused of a crime who knew nothing of it and was tried by a court and convicted, of which trial he had no knowledge. This certainly was very impressive on the Court-Martial that tried petitioner, and the five members of the court evidently added to this evidence their own impression of petitioner, gained by observing him during the trial, and recommended a psychiatric examination. The Solicitor General suggests that the Court-Martial did not know of Dr. Segal's examination of petitioner and his psychiatric report. We think, from the record, the contrary is true, because the report was a part of the record and the Court-Martial, before passing sentence, would review all of the record in the case. We think it more probable that Captain Segal's report might have added to the influence on five members asking for the psychiatric examination, because the report itself throws doubt on the status of petitioner's mental stability at that time.

But in denying Whelchel the benefit of Article 87b, there was lost forever the opportunity to find out further about the truth of the matter through a thorough psychiatric examination. Doubtless, Captain Segal's examination was the mere cursory examination given to all soldiers charged with crime, hurriedly made and, therefore, inconclusive. The denial of the reviewing authorities to grant Whelchel the benefits of Article 87b, in the face of the recommendation of five members of the court that tried him, as as flagrant a violation of the due process clause as could be found.

We are by no means convinced by the ingenious argument of the Solicitor General that the whole court-martial procedure is not unconstitutional and void, but, of course, the court may not get to that question. Strange as it may

seem, for more than one hundred years this court-martial statute and procedure has not been passed upon directly by the highest court in the land. Counsel for respondent cites as authority the fact that this court has refused writs of certiorari where the question of constitutionality of this statute was involved, but this Court has held many times that the refusal of a writ is not authority for the conclusions of the lower court. We ask the court to review our argument made in our brief in the Court of Appeals and on the application for certiorari on this question. We further quote in support of our argument that the law is unconstitutional, an article in the Stanford Law Review, April 1950, page 547, as follows:

> "Designated commanding officers are authorized to convene courts-martial. It is the responsibility of these same officers (1) to determine what cases shall be tried, (2) to select the type of court, (3) to appoint all members of the court, (4) to appoint the trial judge advocate or prosecuting officer, and (5) in most cases, to appoint counsel for defense. If there is a conviction the same commanding officer reviews the record of the trial, and has the power to reduce the sentence. The sentence can only be executed if ordered by the commanding officer or higher authority. This concentration of power in one man has no counterpart in the administration of justice in the civil courts. A fair and impartial trial is obviously difficult in such an atmosphere of command control. An officer who the commander believes is too lenient can be removed from service on the court; a defense counsel who is too successful may not remain a defense counsel very long. All the personnel connected with the trial are dependent on the commanding officer for assignments, leaves, and promotions. Even a slight deviation from the commander's wishes is likely to bring a severe reprimand. Under these circumstances, many officers will be susceptible to his influence. An illustration of the pervasiveness of command control is the custom of army courts-

> martial automatically to impose maximum penalties because the commander wants exclusive control over length of sentences.''

For the reasons stated in this argument and in our previous briefs, it is respectfully submitted that the court should reverse the judgments of the trial court and of the Court of Appeals and render judgment ordering the petitioner released from custody.

HUGH CARNEY,
Atlanta, Texas,
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No. 109

In the Supreme Court of the United States

OCTOBER TERM, 1950

MARTIN L. WHELCHEL, PETITIONER

v.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 62) is reported at 176 F. 2d 260, and its opinion denying rehearing (R. 72) is reported at 178 F. 2d 760. An informal oral opinion of the District Court, not reported, appears in the record at page 48.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1949 (R. 66). The order of the

Court of Appeals denying rehearing was entered on December 28, 1949 (R. 72). The petition for a writ of certiorari was filed March 22, 1950, and was granted, with leave to proceed in forma pauperis, on June 5, 1950 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioner is entitled to raise the question of the interpretation or constitutionality of Article 53 of the Articles of War, which provides that actions on applications to the Judge Advocate General for new trial shall be binding on the court, where the civil courts had decided the case on the merits of his petition for a writ of habeas corpus before the petition for a new trial before the military authorities was acted upon.

2. Whether a petition for habeas corpus was properly denied in the light of petitioner's claim that he was insane both at the time of the offenses and at the time of trial.

3. Whether the court-martial proceedings denied petitioner due process in the treatment of the insanity issue or by reason of the failure to include enlisted men on the court.

4. Whether the court erred in refusing a rehearing on petitioner's claim that the court-martial was not properly constituted because of the absence of a law member from the Judge Advocate General's Department.

STATUTES INVOLVED

The relevant provisions of the Articles of War and of the Manual for Courts-Martial are set forth in the Appendix to this brief at pages 32-40.

STATEMENT

On March 16, 1945, petitioner, then a private in the Army of the United States on duty in Europe, was charged with rape of a German woman, in violation of Article 92 of the Articles of War,[1] 10 U.S.C. (1946 ed.) 1564, and assault with intent to commit rape upon another woman, in violation of AW 93, 10 U.S.C. (1946 ed.) 1565 (CM R. 26-28).[2] The charges were referred to an investigating officer in accordance with AW 70, 10 U.S.C. (1946 ed.) 1542 (CM R. 31). On March 24, 1945, the investigating officer submitted a written report which included the following statement, "I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal." (R. 49). On March 25, the Division Neuropsychiatrist of the 89th Infantry Division, to which the petitioner was attached, made a thorough psychiatric examination of petitioner and prepared a written report in which he concluded: "He must be considered legally sane and his personality is in keeping with

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[1] Throughout this brief the various Articles of War will be designated as AW——.

[2] The designation "CM R." will be used herein to refer to petitioner's court-martial record which was received in evidence before the district court (R. 2) and is on file in this Court as an original exhibit.

that of a borderline mental defective with psychopathic traits". (R. 51) Because of the importance of this report to the case, it is reproduced in full as an appendix to this brief at pages 40-43. Following a review of the charges, the expected testimony as shown by the pre-trial investigation, and the psychiatric report, the Division Staff Judge Advocate recommended a general court-martial trial, stating, " * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently." (R. 52)

The court-martial, on April 10, 1945, tried petitioner and found him guilty as charged (CM R. 125). He was sentenced to be hanged (CM R. 128). Neither at the pre-trial investigation nor at the trial itself was the defense of insanity raised. An April 16, the Division Staff Judge Advocate reviewed, and recommended approval of, the record of trial (CM R. 14-20), and on April 19, the Commanding General of the Division, as the reviewing authority, approved the sentence and forwarded the record for further appellate review. (CM R. 129)

Thereafter, on April 25, 1945, fifteen days after the trial, petitioner's trial counsel wrote to the Commanding General of the 89th Division stating that he had received information that petitioner's offenses might have been committed while he was in an "epileptic episode", and requesting "that the case be reopened and that Private Whelchel be admitted to a hospital for a thorough neuropsychi-

atric examination." (R. 22) There was attached to this letter another letter by a medical officer,[3] a statement by petitioner's immediate commanding officer,[4] a statement by a Sergeant who had observed the petitioner,[5] and a statement of concurrence in the request by five of the six members of the court-martial (CM R. 135). The letter and its enclosures were forwarded to the Headquarters of the European Theater of Operations, which by this

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[3] Captain Pellettieri's statement, dated April 23, 1945 (which is set forth in full in the Appendix at pp. 43-45), was to the effect that petitioner's "entire behavior on the night of the 14th of March, 1945 [date of the offenses] was that of an insane or drunken individual;" that "he either was so drunk he did not know what he was doing or that he had an epileptic episode"; that his lack of concern about his crime and his firm conviction of his own innocence "were the result of his amnesia of the whole incident"; that in one instance he fired a machine gun in a rear area, but said he did not know why he did it; that at another time, he asked his platoon commander to reduce him from Technician 4th Grade to Private because he was not sure of himself; and that "putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration" (R. 18).

[4] Lieutenant Graham's statement, dated April 24, 1945, stated that on or about February 21, 1945, petitioner, apparently intoxicated, asked to be reduced from Technician 4th Grade to Private; that he told petitioner to go to bed and think it over, but instead petitioner fought with two or three of his best friends; that petitioner fired a machine gun over the head of one of the men; that the next day petitioner was reduced to Private; and that when questioned about the incident of the day before he had no knowledge of it (CM R. 132).

[5] Sergeant Goolsby's statement, dated April 24, 1945, was to effect that on or about February 21, 1945, petitioner, after drinking, became very quarrelsome with his best friends; that he shot a machine gun over the head of his assistant driver; and that after this he "appeared to crack up mentally" (R. 23).

time had the case before it for confirmation, with the notation that, "The attached request * * * indicate[s] that there is some question of this man's sanity. He was, however, examined by the Division Neuropsychiatrist before case was referred for trial and found legally sane." (R. 59)

Subsequent to the receipt of the record and the request for the further examination, the Staff Judge Advocate of the European Theater of Operations reviewed the record (R. 53-58) and on his recommendation General Eisenhower confirmed the sentence but commuted it to life imprisonment. (CM R. 130) Still later, on August 24, 1945, the Board of Review in the branch office of the Judge Advocate General, European Theater of Operations, examined the entire record and determined that it was legally sufficient to support the findings of guilty and a sentence. (CM R. 3-8) The sentence was then approved by the Assistant Judge Advocate General. (CM R. 1) On July 16, 1947, by direction of the President, petitioner's period of confinement was reduced to 21 years, and on September 15, 1949, was further reduced to 18 years.

While the petitioner was serving his sentence in the Federal Correctional Institution in Texarkana, Texas, he instituted the present habeas corpus proceeding in the District Court for the Eastern District of Texas, challenging the validity of his conviction on the ground that he was mentally incapacitated at the time of the alleged offense and

at the trial. An order to show cause was issued and the court received evidence and argument on February 18, 1949.

At this hearing the entire court-martial record was introduced in evidence. Petitioner produced a deposition by Captain (now Doctor) Pellettieri, the medical officer whose statement had been brought to the attention of defense counsel immediately after the court-martial proceeding. In his deposition Dr. Pellettieri stated that he had not made a psychiatric examination of the petitioner nor any general physical examination. He stated, "I asked him a few questions, but his answers were vague and he was negativistic". (R. 17) He also testified that in his opinion petitioner was not mentally responsible for his acts at the time of the offenses in question (R. 19, 20), or at the time of his trial (R. 19), and in response to a question as to whether petitioner's mental condition precluded him from making a valid defense, the Doctor answered that petitioner "had a complete blackout" and "did not remember" committing the offenses (R. 20). It was admitted that Dr. Pellettieri was "just a general medical practitioner" and not a psychiatrist. (R. 16)

Petitioner also called as a witness his Commanding Officer, who testified concerning the incidents described in his earlier statement (see footnote 4, supra, p. 5). He also stated that he had told petitioner at the time of these incidents that he thought he was crazy rather than drunk (R. 26-

28), and that petitioner showed no emotion when his death sentence was announced at the trial. (R. 28-29) In addition, the court permitted him to testify that in his opinion petitioner was not mentally responsible at the time of the trial. (R. 29) The witness, however, had made no such representation to the court-martial at the time of the trial (R. 29), at which he was a character witness for the petitioner. (R. 29) He also stated that he was the one who had signed the charge sheets containing the accusations against petitioner. (R. 33)

A friend of petitioner's grandfather and father testified that about three years before the grandfather's death, at the age of 80, he was considered insane by the community in which he lived (R. 35) and that petitioner's father got into fights with neighbors on several occasions and later said that he did not remember the incidents. (R. 35-37) This witness, was also permitted, over objection, to give hearsay testimony of statements by a deceased doctor who treated petitioner's father when he took poison, to the effect that it was better for him to die than to get well, because "he is crazy and he would kill someone else." (R. 37)

The petitioner himself testified that he had no memory of the incidents preceding the offenses in question; that he had no recollection of the events on the night of the offenses; that he had no recollection about the court-martial trial; and that he first came to himself in the death house in France.

(R. 39-44) This testimony is inconsistent with the written statement of petitioner given the investigating officer in which petitioner claimed that on the night of the offenses he had played cards, drunk some wine and gone to bed (CM R. 72).

The District Court denied the habeas corpus petition (R. 59-60) and the Court of Appeals for the Fifth Circuit affirmed the order of denial. (R. 62-65) Petitioner then filed a motion for rehearing in the Court of Appeals, and, while this motion was pending, he applied to the Judge Advocate General for a new trial pursuant to AW 53 of the amended Articles of War which became effective on February 1, 1949. (10 U.S.C., Supp. III, 1525) This application was denied by the Judge Advocate General, and the Court of Appeals thereafter overruled the motion for rehearing. (R. 72)

SUMMARY OF ARGUMENT

This case does not involve the question whether resort to a petition for a new trial before the military authorities under AW 53 is a prerequisite for jurisdiction in a habeas corpus proceeding. A petition for a new trial has been filed and denied by the Judge Advocate General. Nor does the case raise any question as to the finality of the action by the Judge Advocate General in denying a new trial or the constitutionality of the provision that action on a petition for a new trial shall be binding on the courts. The court below decided the case on its merits, and it was not until the peti-

tion for rehearing before it was filed that the denial of the application under Article 53 was presented to it. Therefore, regardless of the language in the court's opinion in denying the motion for rehearing, the fact remains that it had already considered the case on its merits.

What is before this Court is the allegation that petitioner was insane both at the time of the offense and at the time of trial. This alleged insanity, it is argued, should have led to a grant of the habeas corpus petition on two grounds: First, it is argued that it prevented the petitioner from receiving a fair trial under the reasoning of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458; and Second, the treatment of the issue of insanity by the court-martial and the reviewing and confirming tribunals was not in accord with the Manual for Courts-Martial then in effect. This all assumes that a real showing of insanity was made to the District Court. That is contrary to the fact. The evidence before the court, as before the court-martial, indicated that petitioner was drunk (but not so drunk as not to be conscious of his acts), not insane. The question of his sanity was raised by his defense counsel, supported by a medical officer who was not a psychiatrist, after he had been sentenced to be hanged. It was apparently based on compassion for his predicament rather than on fact. On the facts of this case this Court should never come to the legal issues of whether insanity is a basis for habeas corpus, or whether the Manual

for Courts-Martial was followed, or whether, if it were not, failure to follow it was jurisdictional.

However, even assuming petitioner's view of the facts, it is apparent that his legal points are without validity. Insanity is a question of fact for the trial tribunal, frequently raised under the plea of not guilty. It is not a jurisdictional fact which deprives the court of power to try the issue. The verdict in courts-martial, as in civil courts, is "not guilty" if, on trying the issue, it is found that the defendant was insane. As in other non-jurisdictional issues, it is not the function of the habeas corpus court to review the court-martial proceedings for error; that is for the appellate military tribunal.

In so far as compliance with the applicable military procedures is concerned, it is equally clear that the pre-trial, the trial, and the reviewing and confirming procedures were strictly followed. No doubt was cast on the original psychiatric examination and no need for a new one was demonstrated.

The contention that the court was improperly constituted because it was comprised entirely of officers is without validity. Courts-martial both before and after the Revolution had always been so constituted and the petitioner had no rights under the Constitution to a different method of military trial than the ordinary method then in effect.

Finally, petitioner at the late date of his application for a rehearing before the Court of Appeals attacked the court-martial because of the absence

of a member of the Judge Advocate General's Department as a law member. He does not even allege that such a person was available, and the record itself indicates that in fact no such member was available. There is therefore, no ground for reversal on this basis.

ARGUMENT

I

Article 53 of the Articles of War Providing That Action on an Application for a New Trial Shall be Binding on the Courts Did Not Affect Petitioner's Rights in the Present Case.

At the time this Court granted certiorari in this case it also granted certiorari in *Gusik* v. *Schilder*, No. 110. In both petitions it was argued that AW 53 (10 U.S.C., Supp. III, 1525) is unconstitutional as a suspension of the right of habeas corpus.

The revised Articles of War, providing, among other things, a statutory proceeding for new trials, became effective on February 1, 1949. (Sec. 244, Act of June 24, 1948, Ch. 625, Title II, 62 Stat. 642.) The procedure was provided by AW 53 set forth in the appendix at page 34. In so far as it is involved in this case, the significant language is the last clause providing:

> . . . orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon the departments, courts, agencies, and officers of the United States.

Since the petition for habeas corpus was filed on January 13, 1949, prior to the effective date of the revised Articles of War, the new trial procedure before the military tribunal could not have been resorted to before the time of filing. However, AW 53 did become effective before completion of the case, and the issue was raised in the Court of Appeals whether compliance with the new trial procedure was a prerequisite to habeas corpus. The Court of Appeals, as a separate ground for affirmation, stated in its original opinion that it believed the application for a new trial should be filed before action by the civil courts (R. 65). However, a petition for rehearing before the Court of Appeals was filed and the Court delayed entering an order to give petitioner an opportunity to apply to the Judge Advocate General under AW 53. (R. 72) Petitioner did so apply and his application for a new trial was denied by the Judge Advocate General. (R. 69)

Thus, as this case comes before this Court, the issue of whether a petitioner must apply for a new trial under AW 53 before applying for habeas corpus has been eliminated.

Petitioner, however, attempts to bring AW 53 back into the case by asserting that the provision making orders of the Judge Advocate General "binding on the courts" is a *pro tanto* suspension of the writ of habeas corpus in violation of Section 9 of Article I of the Constitution.

This issue is more fully treated at pp. 12-18 of our brief in *Gusik* v. *Schilder,* No. 110, which is being filed simultaneously with this brief. Our position is that the finality provision of AW 53 does no more than codify the existing rule that civil courts will not review or correct court-martial proceedings except on jurisdictional issues. If we are correct in this interpretation, the civil courts are in no wise deprived of their jurisdiction and no basis exists for asserting that the right to habeas corpus has been curtailed.

However, even if it be assumed that AW 53 does attempt to prevent review of jurisdictional questions, and if it be further assumed that it is therefore unconstitutional, petitioner in this case is not entitled to complain. The District Court granted him a full hearing on the merits and the Court of Appeals upheld the findings of the District Court referring to the necessity of resorting to AW 53 only as an alternative ground for its decision (R. 65). It was not until the time of filing of the amended petition for rehearing addressed to the Court of Appeals that any question of the finality of orders under AW 53 became involved. Since the only new ground asserted for a rehearing was, on the facts of this case, a non-jurisdictional one (involving the absence of a member of the Judge Advocate General's Department as law member of the Court), it seems clear that the Court could not properly have reviewed the exercise of discretion by the appointing authority

on this matter, and that therefore the rehearing would have had to be denied wholly apart from the provision of AW 53 (see pp. 29-31, *infra*).

II

Petitioner Has Presented No Facts as to His Sanity Which Would Warrant the District Court in Granting Habeas Corpus.

In Point III, *infra*, pp. 21-25, we argue that sanity is not a jurisdictional issue which can be reviewed on habeas corpus. But assuming the contrary, the matter was fully tried in the District Court and petitioner's contention rejected. The Court of Appeals affirmed this finding (R. 65). The decision, we submit, was clearly correct.[6]

Petitioner was granted great latitude in the District Court to submit all available evidence on his sanity. There was introduced the complete record before the military authorities as well as additional testimony and depositions. But petitioner utterly failed to introduce any convincing evidence that he was insane either at the time of the offense or at the time of the trial.

The ordinary test of criminal responsibility is whether the defendant was able to tell right from wrong. *Fisher* v. *United States*, 328 U.S. 463, 466; *Davis* v. *United States*, 160 U.S. 469, 485; *Hotema* v. *United States*, 186 U.S. 413; *Holloway* v. *United States*, 148 F. 2d 665 (C.A. D.C.), cer-

[6] Uncer Rule 52 (a) of the Rules of Civil Procedure, the District Court's findings must be affirmed "unless clearly erroneous."

tiorari denied, 334 U.S. 852. Under the Manual for Courts-Martial, 1928, the same test is applicable to military trials. Paragraph 78a of the Manual provides:

> * * * A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

The test for insanity at the time of trial is whether he could comprehend his own condition with reference to the accusation pending against him and could rationally conduct his defense. *Ashley* v. *Pescor*, 147 F. 2d 318 (C.A. 8); *Moss* v. *Hunter*, 167 F. 2d 683 (C.A. 10). Again the test as applied to military trials is the same. Paragraph 63 of the Manual for Courts-Martial (1928) phrases the test as whether the accused has the mental capacity "to understand the nature of the proceedings" and "intelligently to conduct or cooperate in his defense."

In a habeas corpus proceeding, the burden is on the petitioner to prove his allegations by a preponderance of the evidence. See *Hawk* v. *Olson*, 326 U.S. 271, 279; *Walker* v. *Johnston*, 312 U.S. 275, 279; *Johnson* v. *Zerbst*, 304 U.S. 458, 468; *Brewer* v. *Hunter*, 163 F. 2d 341, 343 (C.A. 10); *Forthoffer* v. *Swope*, 103 F. 2d 707, 710 (C.A. 9). The evidence before the District Court in this case

failed to convince it that petitioner had met this burden. A review of the facts will show that this Court should sustain that finding.

The most important item of evidence was the report of the Division Neuropsychiatrist who examined the petitioner on March 25, nine days after the offense. The thorough nature of this examination appears from the report of the doctor, which is printed in full in the Appendix to this brief at pp: 40-43, *infra*. With respect to petitioner's awareness of his position, the report states, "He is oriented for time, place, and person and both remote and recent memory are adequate." (R. 51) In summary and conclusion, the report states:

> Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psychopathic traits. [R. 51]

This report reflects the only psychiatric examination of the petitioner which has been made, so far as the record shows, up to the present time. No question has been raised as to the adequacy of the examination or the qualifications of the doctor. The report is attacked solely on the ground that the doctor's assumption that there was no history of insanity in petitioner's background was erroneous. However, the evidence on this came from lay wit-

nesses and is inherently so weak as to cast no doubt on the report.[7]

Since, under Paragraphs 78a and 63 of the *Manual for Courts-Martial,* insanity was a defense, part of the pre-trial procedures involved investigation of the sanity of the accused. The investigator in this case reported on March 24, 1945, "I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal" (R. 49).

Another pre-trial step was a review of the charges and investigation by the Staff Judge Advocate. His report states, "* * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently" (R. 52).

The petitioner was of course present at the court-martial proceeding but did not testify.[8] Three of

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[7] A Carl Bradley testified that for three years before the death of petitioner's grandfather at the age of eighty, he was considered insane by the community in which he lived (R. 35). Bradley also testified that petitioner's father was "more or less irritable and seemed to be hard to get along with," that he had fights and did not remember them thereafter, and that a doctor who attended him when he had taken poison said, "It is better that he die than to get well. * * * If he was to get well, * * * he is crazy and he would kill some one else" (R. 36-37). Counsel stipulated that a certain T. J. Barnwell would give similar testimony (R. 38).

[8] Petitioner's failure to testify does not imply a disinterestedness in the outcome of the trial. It should be noted that he had tried to establish an alibi in his sworn statement to the investigating officer (CM R. 72), which had been directly contradicted by two of his comrades (CM R. 64, CM R. 71). He may well have felt that with his alibi destroyed, he would not help his own case by taking the stand.

the persons who later raised question as to his sanity were also present; namely, his defense counsel, his commanding officer, and the doctor who had examined the prosecutrixes. None of these officers raised any question as to his sanity. There was, however, a substantial amount of evifence that petitioner had been drinking heavily and was drunk at the time of the offenses. (CM R. 121, 117, 114).

After the trial was completed, and indeed after its approval by the reviewing authority, petitioner's defense counsel addressed a communication to the commanding general saying that Captain Pellettieri, a Medical Corps Surgeon, had brought to his attention the fact that petitioner might be a victim of epilepsy, and that the crime might have been committed during an epileptic episode, a situation which would have rendered him irresponsible for his actions (R. 22). He stated that petitioner was unconcerned before the trial, and not affected by his sentence when it was announced. On the basis of these facts, he requested that the case be reopened and that the petitioner be admitted to a hospital for a thorough neuropsychiatric examination. He made no mention of the previous examination (R. 22). The statement that petitioner might be a victim of epilepsy is not supported by Captain Pellettieri's deposition, and his original report carries a strong implication that petitioner was intoxicated at the time of the offense (R. 18). There were also at-

tached to defense counsel's letter two letters from the petitioner's commanding officer and a sergeant relating the circumstances of some disturbances in which petitioner had been involved in the preceding February. The request also carried endorsements by five members of the court-martial, concurring in the request.

In addition to the court-martial record, there was also before the District Court a deposition by Doctor Pellettieri, who had made no additional examination of the petitioner. In fact, this deposition detracts from the previous report by making it clear that the doctor had not made a psychiatric examination at any time (R. 17). At the trial in the District Court, petitioner's commanding officer also testified and was permitted to state that he did not think petitioner was mentally responsible. (R. 29).

The petitioner himself also testified before the District Court. He there contradicted a statement which he had made to the investigating officer that he had played cards, had some drinks, and went to bed on the night of the offense. (CM R. 72). He testified that he had no memory of the events which had transpired since before the time of the offense until he found himself in the death house after the trial. (R. 40-44).

The trial court heard all of this evidence and stated, " * * * these opinions are just the flimsiest things I ever heard" (R. 48). The court decided the case on all of the evidence before it and con-

cluded that the petitioner was not insane. It is submitted that his findings are amply supported by the record. Certainly there was no evidence, other than petitioner's statements, that the alleged insanity, even if it existed, was of such a nature as to have rendered petitioner unable to distinguish right from wrong or unable to comprehend his condition with reference to the accusations against him, or unable to assist in his defense. In fact, the facility with which petitioner presented an alibi indicated that he was fully conscious of his wrong doing, aware of the nature of the accusation, and, perhaps misguidedly, able to devise a defense.

III

The Issue of Sanity Was Not a Jurisdictional Matter in the Court-Martial and is Therefore Not Subject to Review on Habeas Corpus.

It is well settled that on a petition for habeas corpus a court is limited to testing the jurisdiction of the military court; it may not exercise supervisory or reviewing power over the proceedings. *Hiatt* v. *Brown*, 339 U. S. 103, 111; *Humphrey* v. *Smith*, 336 U.S. 695; *In re Yamashita*, 327 U.S. 1, 8-9.

The question therefore, is whether the issue of sanity, either at the time of the offenses or at the time of trial, was one of jurisdiction and therefore subject to collateral attack in a habeas corpus proceeding. Although this Court has not passed upon

this question directly in a habeas corpus proceeding to attack a conviction, it has considered the matter with respect to extradition. In two important cases it has held that the issue of insanity is one for determination by the trial court.

In *Drew* v. *Thaw*, 235 U.S. 432, petitioner sought habeas corpus to prevent his extradition to New York for trial. One of the grounds relied on was that he was insane at the time of the commission of the offense charged and therefore he could not be guilty of the crime. In disposing of this contention, the Court said (at p. 440):

> The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy Thaw was insane in such sense as they may be instructed would make the fact a defence.
> * * *

And in *Charlton* v. *Kelly*, 229 U.S. 447, 462:

> * * *. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defend-

> ing the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. * * *

The question has been directly raised in various of the Courts of Appeals, and the almost unanimous answer has been that the issue of insanity cannot be raised on habeas corpus. It is held that insanity at the time of the offense is a defense which must be raised before the trial court and, since it is not jurisdictional, the court's determination is not subject to collateral attack. Similarly, insanity at the time of trial must be asserted as a bar to trial, again a matter of fact for the trial court and not an issue which can be reexamined except on direct appeal. *Hahn* v. *United States*, 178 F. 2d 11 (C.A. 10); *McMahan* v. *Hunter*, 150 F. 2d 498 (C.A. 10); *Whitney* v. *Zerbst*, 62 F. 2d 970 (C.A. 10); *Srygley* v. *Sanford*, 148 F. 2d 264 (C.A. 5); *Fenton* v. *Aderhold*, 44 F. 2d 787 (C.A. 5); *Hall* v. *Johnston*, 86 F. 2d 820 (C.A. 9); *Myers* v. *Halligan*, 244 Fed. 420 (C.A. 9); but see *Ashley* v. *Pescor*, 147 F. 2d 318, 320 (C.A. 8); *Brewer* v. *Hunter*, 163 F. 2d 341 (C.A. 10); *Moss* v. *Hunter*, 167 F. 2d 683 (C.A. 10).

In the military courts it is clear from the Manual of Courts-Martial proceedings that insanity is not treated as a matter of jurisdiction. Paragraph 65 of the 1928 Manual which was in effect at the time of the trial states:

> COURTS-MARTIAL — PROCEDURE — PLEAS — *Plea to the jurisdiction*—This plea may be based on an absence of any of the conditions stated in 7. An objection to which a plea to the jurisdiction is applicable can not be waived and may be asserted at any time.

Paragraph 7 provides:

> The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged.

Insanity clearly does not come within any of the categories of jurisdiction listed in the quoted paragraph. Thus, the military authorities, like the civil courts do not treat insanity as a jurisdictional issue.

The principal authority in favor of the power in a court to consider sanity on a petition for habeas corpus is *Ashley* v. *Pescor*, 147 F. 2d 318 (C.A.

8) [9] In that case the court, relying mainly on *Johnson* v. *Zerbst, supra,* held that with respect to a defendant previously adjudged insane and found to be still insane, a plea of guilty was in effect a nullity. Apparently no attempt had been made by the trial judge to ascertain whether he had the capacity to understand the nature and consequences of his plea. The present case is clearly distinguishable since the military authorities did have before them the question of the petitioner's sanity and did decide it adversely to him. To reexamine the question in the present setting would require a reconsideration and a correction of specific findings of the military authorities.[10] Cf. *Hiatt* v. *Brown,* 339 U. S. 103 at 110-111.

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[9] Petitioner also seeks to find support in *Forthoffer* v. *Swope,* 103 F. 2d 707 (C.A. 9) but an examination of that case discloses that the question of sanity was explored in the habeas corpus court in order to determine whether the defendant had been legally capable of waiving counsel. See also *Frame* v. *Hudspeth,* 109 F. 2d 356 (C.A. 10), reversed, 309 U.S. 632.

[10] When petitioner applied for a new trial under AW 53, the Judge Advocate General of the Army, in denying the petition stated: "I entertain no doubt that Whelchel was so far free from mental defect, disease, and derangement as to be able concerning the particular acts ~~charged both~~ to distinguish right from wrong and to adhere to the right, and that consequently he was mentally responsible for the offenses of which he was found guilty. Nor do I question accused's mental capacity either to understand the nature of the proceedings or intelligently to cooperate in his defense. The indication by Dr. Pellettieri that Whelchel may have committed the offenses during an epileptic episode appears entirely groundless. Counsel at the oral hearing stated that Whelchel had no history of epilepsy. This is confirmed by psychiatric examinations of Whelchel made periodically since the beginning of his confinement, which report essentially negative neuropsychiatric findings."

IV

There Is Before This Court No Error in the Court-Martial Procedure

The petitioner argues that habeas corpus should have been granted because of three separate and distinct errors in the court-martial proceedings:

(a) Failure to act properly upon the issue of insanity when it was raised;

(b) failure to include enlisted men on the court; and

(c) failure to designate a member of the Judge Advocate General's Department as the law member of the court-martial.

(a) There was no failure to follow the prescribed procedures of the Articles of War or the Manual of Courts-martial with respect to the treatment of the insanity issue. Petitioner argues that under par. 87 (b) of the Manual [11] the reviewing authorities should have ordered a psychiatric examination as requested by his counsel. Paragraph 87b of the Manual, which is set forth in full in the Appendix, *infra*, p. 39, requires the reviewing authority to take appropriate action where it appears from the record or otherwise that the accused may have been insane either at the time of the offense or at the time of trial. However, the facts are clear, that until April 25, 1945, defense counsel had not asserted that the accused was insane (R. 22), while the reviewing authority

[11] Petitioner refers to this as Article 87 (b) of the Articles of War, but he obviously means the above cited paragraph of the Manual.

had completed its review on April 19, 1945. (CM R. 129) Therefore, all that the reviewing authority had before it on the insanity issue was the report of the investigating officer, the report of the Division neuropsychiatrist, and the statement of the Commanding Officer bringing the charges, all of which stated that petitioner was sane. Clearly, there was no occasion for the reviewing authority to order a psychiatric examination under Section 87 (b) of the Manual.

Perhaps petitioner intended to apply his argument to the confirming authority which, under par. 88 of the Manual for Courts-martial, must "be guided by the principles and provisions of 87 as far as applicable". If the confirming authority had felt the situation warranted it could have ordered a second psychiatric examination. This authority did have before it the request of the defense counsel together with the attached letters. However, it was a question of judgment whether the facts warranted further examination, and the Staff Judge Advocate recommended confirmation. Since the ordering of a further examination was not mandatory, but was a question of judgment and discretion, and there appears to have been no abuse of the authority, the courts below were bound to refuse to review the judgment of the military authorities. Cf. *Hiatt* v. *Brown*, 339 U.S. 103; *Humphrey* v. *Smith*, 336 U.S. 695.

(b) Petitioner's assertion that he was deprived of his constitutional rights under the 5th and 9th Amendments to the Constitution because enlisted men were not included on the court is also without merit. Apparently the argument is essentially that he was deprived of due process since the court-martial was not so constituted as to grant him a fair trial. In determining what rights exist under military law, it is well established that these rights are essentially different from those obtaining in our civil courts. *Ex Parte Quirin,* 317 U.S. 1, 40; *Kahn* v. *Anderson,* 255 U.S. 1.

Historically, both before and since the adoption of the Constitution, courts-martial have uniformly been composed of officers. In Winthrop's *Military Law and Precedents, Second Edition,* Reprint 1920, at pages 931 *et seq.*, are collected the *British Articles of War 1765* which were in force at the beginning of the Revolutionary War; the *Articles of War of Massachusetts of 1775* (id. page 947); the *American Articles of War of 1776* (id. page 961); the *American Articles of War of 1806* (id. 976) as well as Articles of War of earlier and later dates. Under none of these statutes could enlisted men sit on courts-martial.

This very question was recently raised in *De War* v. *Hunter,* 170 F. 2d 993 (C.A. 10), certiorari denied, 337 U.S. 908. The court stated at p. 997:

> Appellant's contention that a court-martial constituted to try a private soldier, composed entirely of officers, violates the 6th Amend-

ment of the Constitution, in that it denies him a right to a trial before his peers or equals, is not well founded. The right of trial by jury guaranteed by the 6th Amendment to the Constitution of the United States is not applicable in a trial by military court-martial. Hence, decisions respecting the right to trial by one's peers in civil courts are inapplicable. A soldier is subject to military law and what constitutes due process in a trial by a military tribunal is gauged by the principles of military law enacted by the Congress, * * *.

Under the Revised Articles of War, a defendant may now request that enlisted men be included on the court-martial trying him. (AW 4, 10 U.S.C., Supp. III, 1475). But this was not the law at the time petitioner was tried and he was not deprived of any Constitutional right thereby.

(c) Finally, the court below was entirely justified in refusing to reconsider its judgment on the ground that the law member of the court-martial was not a member of the Judge Advocate General's Department as petitioner claims is required by AW 8.

Although petitioner made his motion for a rehearing before the Court of Appeals on the ground of newly discovered evidence, the record of the court-martial which was introduced in the District Court and a copy of which had been in the petitioner's hands since April of 1945 (CM R. 92) disclosed on its face that the law member was not selected from the Judge Advocate General's De-

partment. Thus, this issue, which had not been raised in the District Court nor before the Court of Appeals, was not in fact based on newly discovered evidence and the issue was not seasonably presented.

Without regard to whether the issue was properly before the Court of Appeals, a complete answer to petitioner's argument is that this Court has recently passed on whether failure to name the law member from the Judge Advocate General's Department is a basis for granting a writ of habeas corpus. This Court has decided that, in the absence of gross abuse of discretion, it is not. *Hiatt v. Brown*, 339 U.S. 103.[12]

If there was no abuse of discretion in the *Hiatt* case,[13] it is even more obvious that petitioner has no valid complaint in this case. He has made no showing whatsoever of the availability of a member of the Judge Advocate General's Department. In fact, the record itself indicates the non-availability of such an officer, since the entire panel from which the court was chosen did not include a single officer from that Department. (CM R. 96). Clearly, petitioner has not sustained his bur-

[12] The Court specifically left undecided the question of whether failure to follow AW 8 is a jurisdictional matter. 339 U. S. 103, 110. For a discussion of that issue we respectfully refer the Court to pp. 13-33 of Petitioner's brief in that case.

[13] In that case the assistant trial judge advocate was drawn from the Judge Advocate's Department, but this court held that the convening authority had discretion to determine whether or not such member was "available" to serve as the law member of the court.

den of proving an abuse of discretion. Petitioner's argument must be taken to mean that in all cases the Articles of War require that the law member be chosen from the Judge Advocate General's Department. This is clearly contrary to the language of the Article and to the decided cases dealing with it. *Hiatt v. Brown, supra; Henry v. Hodges,* 171 F. 2d 401 (C.A. 2), certiorari denied, 336 U.S. 968.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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OCTOBER 1950.

APPENDIX

1. *Statutes.*

The following provisions of the Articles of War in effect at the date of the court-martial proceedings are pertinent:

Article 4 (10 U.S.C. (1946 ed.) 1475).

Who may serve on courts martial. All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts martial in excess of the minority membership thereof. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 788.]

Article 8 (10 U.S.C. (1946 ed.) 1479).

General courts martial. * * *

The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is

not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 788.]

Article 92 (10 U.S.C. (1946 ed.) 1564).

Murder; rape. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 805.]

Article 93 (10 U.S.C. (1946 ed.) 1565).

Various crimes. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court martial may direct. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 805.]

The following provision of the Articles of War as amended in 1948 and effective February 1, 1949, is pertinent.

Article 53 (10 U.S.C. (Supp. III) 1527).

Petition for new trial. Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the

proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States. [As amended July 26, 1947, c. 343, Title II, § 205 (a), 61 Stat. 501; June 24, 1948, c. 625, Title II, § 230, 62 Stat. 639.]

2. *Manual for Courts-Martial* (1928 ed.)

The following provisions of the Manual for Courts-Martial (1928 ed.) are pertinent:

7. COURTS-MARTIAL—JURISDICTION IN GENERAL—Source, nature, and requisites.— * * *

* * * * * *

The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged.

35. COURTS - MARTIAL — PROCEDURE BEFORE TRIAL — Submission of and Action Upon Charges—*Investigation of charges; reference to staff judge advocate; suspected insanity.* * * *

* * * * * *

c. Suspected Insanity.—An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or the report of a board convened under AR 600-500 in a case where that regulation applies and it is practicable to convene such a board. The medical officers or board will be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should ordinarily be required to include in the report a statement, in as non-technical language as practicable, of the mental condition of the accused both at the time of the offense and at the time of the examination. The appointing authority may, in his discretion, attach the report to the charges if referred for trial or forwarded.

63. COURTS-MARTIAL — PROCEDURE — Inquiry into Sanity of Accused.—The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense. For instance, the actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to be insane may be a sufficient reason. It should

be remembered, however, that while a person who is insane to the extent indicated above should not be tried, nevertheless, until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court.

The request, suggestion, or motion that such an inquiry be had may be made by any one of the personnel of the court, prosecution, or defense. If such an inquiry is determined upon, priority will be given to the determination of the matter, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that such inquiry may be a long and expensive proceeding, or if the court desires to hear competent expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as indicated in 35*c*, and that the officer or officers, or some of them, conducting the examination be made available as witnesses.

If the court finds that the accused is insane, the proceedings so far as had embodying the finding to that effect will be forwarded to the reviewing authority; otherwise the trial proceeds.

65. COURTS-MARTIAL — PROCEDURE — Pleas — *Plea to the jurisdiction.*—This plea may be based on an absence of any of the conditions

stated in 7. An objection to which a plea to the jurisdiction is applicable can not be waived and may be asserted at any time.

75. COURTS-MARTIAL — PROCEDURE — Introduction of Evidence.—*a. General duties, etc., of court.*—

* * * * *

If at any time before the court announces an acquittal or imposes a sentence it appears to the court for any reason that additional evidence with respect to the accused's mental responsibility for an offense charged should be obtained in the interest of justice, the court will call for such additional evidence. The court may adjourn pending action on a request made by it to proper authority that the accused be examined by one or more medical officers and that such officer or officers be made available as witnesses. See 35*c* (Suspected insanity) in this connection. A request, suggestion, or motion that additional evidence be called for by the court as contemplated herein may be made by any one of the personnel of the court, prosecution, or defense. The court may, in its discretion, give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense. See 78*a* (Reasonable doubt). If the court determines that the accused was not mentally responsible, it will forthwith enter a finding of not guilty as to the proper specification. Such priority should be given where the evidence on the matters set forth in the specification is voluminous or ex-

pensive to obtain and has little or no bearing on the issue of mental responsibility for such matters.

* * * * *

78. COURTS-MARTIAL—PROCEDURE — Findings. —a. *General—Basis of Findings.*— * * *

* * * * *

Reasonable Doubt. * * * Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

* * * * *

87. COURTS-MARTIAL — ACTION — Reviewing Authority — b. *Powers and Duties.—In General.*— * * *

* * * * *

The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.

* * * * *

88. COURTS-MARTIAL—ACTION — Confirming Authority.—* * *

A confirming authority will be guided by the principles and provisions of 87 as far as applicable.

3. *Psychiatric Report*

HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Surgeon

APO 89 US Army
25 March 1945

Subject: Psychiatric examination of Pvt Marton L. Whelchel, ASN 18038433, Co C, 602nd TD BN. Age 22 years. Four years in the Army.

To: Assistant Chief of Staff, G-1, 89th Infantry Division APO 89 US Army.

Present Complaint:

This soldier's version of his present difficulty is as follows: On the evening of 14 Mar 45 he was in the securities section and borrowed a thousand francs from a friend. With it he played poker until 2200 and then returned to his section. They were having a drinking party during the course of which he drank two-thirds of a bottle of white wine. The party broke up about midnight. "We all went to bed and fell to sleep and I didn't get up until the next morning. The next morning both girls picked me out but I never had anything to do with them. I believe I had seen her in town before and that is how she may have known me."

Family History:

Father died at the age of 35 from some unknown cause when soldier was four years old. Mother is 68 years old and has been married three times, her previous husband having died each time. She is considered a rather nervous woman and is an enthusiastic follower of the Holy Roller Church. He has three full sisters who are alive and well and four half-sisters who are also alive and well. There is one full brother who is in the Army somewhere in the ETO. Another brother was killed in the Pacific theatre and he has a half-brother at home who is a cripple. There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily.

Personal History:

Medical History: He had the usual childhood diseases and tho he denies any history of venereal disease, he was treated for a "strain" (urethral discharge), in 1944.

Social History: As a child he had no fits, convulsions, temper tantrums, or sleep walking and he doesn't recall being enuretic. He comes from the state of Texas and says he always enjoyed company and made friends easily. However, the only sport he ever indulged in was playing cards. He reached the sixth grade in school and quit at the age of twelve years after repeating a number of grades. He always found school rather difficult. He had been drinking rather heavily as far back as he can remember and even states that his father

started them off drinking beer as infants because he felt "it was healthy."

The soldier was married in 1941 at the age of 19 to a girl of 18. There were no children by the marriage. While he was at camp, his wife "just got to going with a sailor and wanted a divorce." This was granted on the grounds of cruelty. He was a chronic nail-biter and always mildly nervous. He started driving a truck for his brother-in-law at the age of 13 and kept this job until entering the Army.

Army Record:

In 1943 he was arrested for drinking, in the course of which he "whips some MP's and shut them in a back room of a tavern". For this he received 30 days of hard labor and was reduced from Pfc. to Private. The highest grade he ever held was a T/4 as a tank driver for one and one-half years. Early this month he just got tired of it and asked to be reduced to his present rank of private. He denies the use of any drugs and is not a member of any church.

Mental Examination:

Attitude and General Behavior: Although this soldier was superficially cooperative, one got the definite impression that much material was definitely being withheld. He revealed a low level of intelligence and his story was such that might have been concocted by an individual having a minimum of native shrewdness.

Stream of mental activity: His speech was guarded at times and tho coherent and relevant. lacked conviction.

Emotional reactions: He was tense and guarded throughout the interview. He fidgeted all the time. There was no discrepancy, however, between emotional expression and thought content.

Content of thought; mental trends: There was no evidence of dillusions, hallucinations, grandosity, or hypochondriacal trends. He was asked, in view of his own inadequate explanation, whether he thought someone was trying to frame him. He jumped at the opportunity to answer this question and said "Maybe the Germans were trying to get even with us for having been put out of their homes."

Orientation, mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Bolleveau intelligence test he scored a mental age of 11 years and 5 months and an IQ of 71.

Insight and judgment: He constantly refused to alter his story in regard to his activities and felt as tho nothing could be proved against him. He admitted that the act of rape was a serious crime and deserved severe punishment.

Summary and Conclusions: Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psycopathic traits.

NATHAN P. SEGEL,
Captain, MC,
Div Neuropsychiatrist.

4. *Communication by Dr. Pellettieri*

MEDICAL DETACHMENT

602nd Tank Destroyer Bn.,

APO #403, U. S. Army

23 April 1945.

201-Whelchel, Marton L. 18038433, Pvt. 602nd T.D. Bn.

Subject: Information in regards to the reopening of the case of Private Marton L. Whelchel 18038433, Co. C, 602nd T D Bn.

To: Commanding General, 89th Infantry Division APO #89, U. S. Army.

Private Marton L. Whelchel's entire behavior on the night of the 14th of March, 1945 was that of an insane or drunken individual, surely not that of a sane or sober man. His complete amnesia of the night causes me to think he either was so drunk he did not know what he was doing or that he had an epileptic episode. True enough his past history in this battalion does not bring out any previous episode but this could very well have been his first one.

My observations of the man after he committed this crime revealed that he never spoke of it and went about unconcerned and firmly convinced of his own innocence. Attempts by fellow soldiers and guards to make him talk about his exploits always brought out a negative answer. I am convinced that his negative answers and self assurance that he was not in serious trouble were the result of his amnesia of the whole incident.

Questioning his officers I was told that he recently had become a very troublesome individual in the company. In one incident he fired a fifty caliber machine gun in a rear area installation and when asked why he did it, he said he did not know. At another time he went to his platoon Commander and asked to be reduced from grade Technician 4th Grade to Private. When asked why he said he felt he could not hold the rating because he was not sure of himself.

Putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration.

(S.) NINO M. PELLETIERI,
(T.) NINO M. PELLETTIERI,
Capt. Medical Corps, Surgeon,
602nd T.D. Bn.

A true copy:
(Signed) FRANK LATNIK,
WOJG, USA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTIN L. WHELCHEL, *Petitioner,*

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

PETITION FOR REHEARING

HUGH CARNEY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTIN L. WHELCHEL,

Petitioner,

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

Respondent

PETITION FOR REHEARING

TO THE HONORABLE COURT:

Now comes petitioner and files this his Motion for Rehearing and would respectfully ask the Court to set aside the judgment of December 4, 1950, and grant a rehearing herein for the following reasons, to-wit:

Petitioner realizes that this Court is burdened with litigation and hesitates to take up the time of the Court in asking a reconsideration of this case, but we feel that the Court in this case, as it has in two or three other cases just prior to this case dealing with judgments of Courts-Martial, has departed from the settled law as laid down by this Court in former cases and has narrowed the scope of habeas corpus to a point where the provisions in the Constitution of the United States providing for writs of habeas

corpus have been nullified so far as an enlisted man convicted by Court-Martial is concerned.

The Court in this case, as it has in these other cases, has held that, before a petitioner can have any relief, he must show that the court was without jurisdiction. We think that is a highly erroneous proposition of law and one not borne out by the decrees of this Court prior to the recent cases of *Humphrey* v. *Smith*, 336 U. S. 695, and *Hiatt* v. *Brown*, 175 F. (2) 273.

The former principles with reference to relief by writ of habeas corpus are expressed by this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 58 Supreme Court 1019, as follows:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

Also, in the case of *Price* v. *Johnson*, 334 U. S. 266, we quote as follows:

> "Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."

We can see no foundation in law for the Court's holding. There is nothing sacred about a judgment of Court-Martial. In fact, it has always been held that a Court-Martial is an inferior court and its decrees might be collaterally attacked anywhere. *Runkel* v. *United States*, 122 U. S. 543. The doc-

trine of want of jurisdiction to set aside a decree of a court has heretofore been applied to judgments of courts of record, and, in spite of this well established doctrine, this Court has many times refused to be bound by the rigidity of the lack of a jurisdictional showing to set aside a judgment wherein a man has been deprived of some of his constitutional rights, as have under the cases where this Court has not hesitated to go behind a finding of a court of record—a District or Circuit Court—where there was not only a judgment of court, but a finding of the jury that his confession was voluntary, and set the judgment aside, because it appeared to this Court, from the facts, that the confession was not voluntary. In all those cases the court could have side stepped the question of whether or not the defendant had been denied his right by saying that the trial court had jurisdiction and had found the facts against the petitioner. So why should this Court now at this late date, after so many years of upholding the rights of a man seeking relief under a writ of habeas corpus, be based solely upon a showing of lack of jurisdiction of the trial court.

We note in the opinion the Court says, "The defense of insanity was not raised, however, either at the pretrial investigation or the trial itself." That is true, but should an insane man be charged with the duty of raising an issue of his own insanity. Surely this Court, or any other court, would not hold that a man who was insane and knew nothing at all of the whole procedure, as was testified by Dr. Pellettieri, would have the knowledge necessary to raise such an issue. Nor could his lawyer raise it at the trial, because it is shown now, undisputedly, that his attorney knew nothing of the man's insanity. He did find it out within ten days after the judgment and made his application to the reviewing authorities for the relief granted by Article 87b. Had he found it out while the trial was in progress,

he would have invoked Article 63 of the Court-Martial Code, as follows:

> "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense."

Counsel for the petitioner asked that petitioner be given a thorough neuropsychiatric examination. The Court, in its opinion, evidently realizes that petitioner should have had a hearing on the issue of insanity somewhere in the proceedings, because the Court says, "we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity." We certainly agree with the Court in that statement, and we say that this record shows that the defendant has never had an opportunity to tender the issue of insanity. He himself could not do it before the investigating authorities because he was insane. His lawyer could not do it before the Court-Martial during the trial because he knew nothing of it, and the only way it could have been determined and the petitioner could have had an opportunity to have the issue of insanity settled, was by the provisions of Article 87b, under which the reviewing authorities should have granted the request of his counsel for a thorough psychiatric examination. That was not done and it will not suffice to say that, thereafter, the reviewing authorities considered this question; because they had no facts upon which to go. The petitioner had lost his opportunity to present to them evi-

dences of his insanity from the thorough psychiatric examination that should have been given him under Article 87b, But the respondent says that he had had one psychiatric examination. True enough, but it was an incomplete examination. It was made on ignorance of facts, which afterwards were presented to the reviewing authorities, and which was shown not to have ever been presented to Captain Segal, who made the preliminary examination. Captain Segal knew nothing of the fact that this man had cracked up, as shown by testimony of Sergeant Goolsby and Captain Graham, some two weeks before this rape occurred. Captain Segal knew nothing of the fact, as shown on trial on the writ of habeas corpus, that petitioner's father and grandfather both had been insane, and, yet, in spite of the fact that Captain Segal was without this most potent information, he called it a "borderline case" and resolved the doubt against petitioner. By the failure to have this thorough psychiatric examination made of the petitioner at that time, there was forever lost the opportunity for petitioner to prove that he was actually insane.

The Court says that petitioner had further consideration by the military authorities of the insanity issue which he tenders. Sure, but not one single shred of evidence is shown that they had other than the first and only psychiatric examination of petitioner made by Captain Segal in the preliminary investigation.

The Court says that since no showing was made of the availability of a member of the Judge Advocate General's Department, there was no gross abuse of discretion. We think a sufficient showing was made, because in the motion for rehearing before the Circuit Court of Appeals, petitioner having discovered for the first time that the counsel appointed for the petitioner at his trial before the Court-Martial was not a lawyer, and in the same petition alleged

that the Judge Advocate General's Department did not aver the fact that, while the law member was not a member of the Judge Advocate General's Department, there was no member of such Department available to act as law member, so, therefore, because the Judge Advocate General, after admitting that counsel was not a member of the Judge Advocate General's Department, failed to assert that there was no available member, therefore, under the usage and proceedings in a trial, a party charged with a fact which is wholly within the party's knowledge, does not deny, must be held to have that fact established against him. In *Hiatt vs. Brown*, 175 F. (2) 273, this Court held that it was immaterial and did not deprive the petitioner of such a right as would authorize the setting aside of the judgment, because it was not jurisdictional. We don't know whether it was shown in *Hiatt* v. *Brown* or not that, had counsel been a member of the Judge Advocate General's Department, there would have been any difference in the trial, but here in this case we can see the importance of having a defendant in the Court-Martial case represented by a trained lawyer. Had petitioner Whelchel been so represented, no doubt the lawyer, with his training, would have discovered, as petitioner's counsel did not, that petitioner was insane while the trial was still in progress before the Court-Martial and would have set up such fact and made an issue of it and invoked Article 63 of the Court-Martial Code. Thus the fact that the petitioner in this case did not have as his counsel a member of the Judge Advocate General's Department resulted in a grave and serious injury to him and, therefore, is such as would require this Court to reverse the judgment of the Court-Martial and release petitioner on his writ of habeas corpus, because his trial was lacking in due process of law, which is defined by Mr.

Justice Frankfurter in *Adamson* v. *People of California*, 67 S. Ct. 1672, as follows:

> "The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

The Court relies strongly upon the fact that the Judge Advocate General, in refusing the evidence of the insanity issue, concluded: "I entertain no doubt that Whelchel was so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right . . ." But the question is: Would the Judge Advocate General so have concluded had Whelchel been given the thorough psychiatric examination, asked by his attorney of the reviewing authorities, which was arbitrarily denied? Of course, it can be said that had Whelchel had that thorough psychiatric examination it might have resulted in a finding of sanity. On the other hand, it might have resulted in a finding of insanity, but the outstanding fact is the great wrong done to petitioner. The arbitrary refusal to give him that test lost forever the opportunity to know and to show to the court the exact truth.

We think that the evidence adduced before the District Court on the trial for the writ of habeas corpus showed

overwhelmingly that petitioner was insane, both, at the time of the rape and at the time of the trial. There was positive evidence by men who should know, his Captain, his Sergeant, Dr. Pellettieri, that at the time of the trial he knew nothing of it, in their opinion. They were competent to form their opinion because they had been associated with him in all that hard fighting across France and Germany at the head of Patton's army. There was no dispute on the part of the Government of this testimony other than the inconclusive psychiatric examination made by Captain Segal, which was shown to have been made on insufficient information, especially the information that petitioner had cracked-up and that his father and grandfather had been insane. This is shown by a sentence in Captain Segal's report, to-wit: "There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily." The result of this decision is that petitioner is probably the only man in the world ever condemned to suffer punishment on a judgment which was impeached by the court itself that tried him. Five members of the six man court that tried this man recommended that the application of Captain Matisin, counsel for petitioner, for a thorough psychiatric examination be granted. Yet, in spite of that fact, the reviewing authorities, although commanded by the provisions of Article 87b to grant that relief, arbitrarily refused to do so. Because this Court and the lower courts hold that, even though petitioner was denied his rights under the law, such denial of rights was not sufficient to be "jurisdictional."

We hope that this doctrine of necessity of jurisdictional defects will not prevail because it will shut the door of hope to three or four million other enlisted men who are at

this time being inducted into the army of the United States.

The Court says in its opinion:

> "The constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action."

What difference would it make about congressional action if the authorities are going to refuse to obey the provisions of the law for the benefit of the enlisted man at their will, and the courts are not going to reverse their holdings because it would not be a jurisdictional question. For instance, now that Congress has declared by law that the membership of the Court-Martial shall be composed of at least two enlisted men, if the military authorities were to say, "Well, we will convene a court-martial without the two members," and the courts will hold that it is not jurisdictional because the G. I. could not show that he suffered any injury thereby. This Court has held that the refusal of the authorities to carry out the provisions of the law with reference to a thorough preliminary investigation is not jurisdictional and, therefore, does not affect the judgment of the Court-Martial. *Humphrey* v. *Smith*, 336 U. S. 695. This Court has also held that the provisions of the law requiring that the defense counsel be a member of the Judge Advocate General's Department, where available, is not jurisdictional (*Hiatt* v. *Brown*, 175 F. (2) 273) and, therefore, where a court was impaneled and defendant tried without such counsel, there was no error because it was not jurisdictional. So we say that this jurisdictional doctrine has crept into the law as a latter day thought without foundation of authority and with gross disregard to the rights of the soldier. So far as a soldier is concerned, it means that the provisions of the Constitution of the United States allowing writs of habeas corpus and providing for

due process of law are dead letters. We hope the Court will not continue to restrict the right of habeas corpus. Rather, we hope that the Court will broaden the right as laid down in *Johnson* v. *Zerbst*, as follows:

> "These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment . . . and the court upon determining the actual facts is to 'dispose of the party as law and justice require.'"

We respectfully urge the Court to grant a re-hearing herein and reverse the judgments of the Circuit Court of Appeals and the lower court and order the Court-Martial judgment set aside and held for nought and petitioner discharged.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Counsel for Petitioner.

STATE OF TEXAS,
County of Cass:

I, Hugh Carney, respectfully certify to the Court that I am counsel for petitioner in the above styled and numbered cause, and that I, in good faith, have made the motion for rehearing and said motion is not made for delay, believing that the Court should set aside its judgment and return judgment for petitioner.

Given under my hand at Atlanta, Texas, this 20th day of December, 1950.

HUGH CARNEY.